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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. [redacted]103

LOUIS J. GARIEPY, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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LOUIS J. GARIEPY, *Petitioner*,

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UNITED STATES OF AMERICA, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner, Louis J. Gariepy, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in the above entitled case on March 9, 1955.

OPINIONS BELOW

The District Court rendered no opinion.

The opinion of the Court of Appeals for the Sixth Circuit, printed as Appendix A, *infra*, is reported at 220 F. 2d 252.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on March 9, 1955 (Appendix B, *infra*).

Rehearing was denied on April 28, 1955 (Appendix B, *infra*). The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

1. The judicial district in which the trial was held was composed of 16 counties (15a-16a).*

The established practice, pursuant to informal court order, was to select jury panels from at most five of the 16 counties, and deliberately and systematically exclude residents of the remaining 11 counties (16a, 49a).

In this case, the petit jury panel was composed of residents of only two of the 16 counties (15a, 49a).

Moreover, the two counties from which the jury panel was drawn—Wayne and Oakland—had been most heavily saturated with pre-trial publicity in the years preceding the trial, because of the prior indictment and conviction of Petitioner's brother—who like Petitioner was also a doctor—on a similar charge (App. 9, 16a-17a, 19a). The trial of Petitioner's brother was accorded "unusual publicity" in Wayne and Oakland Counties in newspapers, radio and television (App. 9).

Petitioner alleged (18a-19a) and the Court below found (App. 9) that the "unusual" pre-trial publicity accorded Petitioner was adverse and detrimental to him in Wayne and Oakland Counties, the two counties from which the members of the jury panel were exclusively drawn.

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* This Petition makes reference to the following: Appendix for Appellant, Supplemental Appendix for Appellant, and Appendix for Appellee, used in the Court below and accompanying this Petition; the original record of the District Court, on file in the office of the Clerk of this Court; and the Appendix to this Petition which is a part hereof. References to the Appendix for Appellant are designated by "a" following the page number; references to Appendix for Appellee are designated by "b" following the page number. References to the Appendix to this Petition are designated by "App." preceding the page number. References to the other materials are specifically descriptive.

Petitioner's timely motion challenging the array of the petit jury panel (13a-19a) was denied (60a). Thereafter, the questioning on *voir dire* of the prospective jurors selected indicated that seven of the original twelve, and four additional prospective jurors, had in fact read or heard about the trial of Petitioner or of his brother (Appendix D, *infra*).

The question presented is: Under these circumstances, was the right of Petitioner to be tried "by an impartial jury of the State and district" where the crime was committed, *Sixth Amendment, Constitution of the United States;* by "an impartial jury drawn from a cross section of the community," *Thiel* v. *Southern Pacific Company,* 328 U.S. 217, 220; and by a jury drawn in a manner "most favorable to an impartial trial," *28 U.S.C. Section 1865 (a);* safeguarded, or should his challenge to the array have been granted?

2. Petitioner was a busy practicing surgeon carrying a very heavy professional schedule (p. 16, *infra*).

His bookkeeping records were maintained by his employees with practically no supervision from him (367a, 338a-341a, 344a, 358a, 360a-361a). His income tax returns were prepared by a professional income tax service (101a-102a, 97a, 317a) from information provided almost entirely by his employees (458a-461a, 463a, 489a, 491a).

The question presented is: under these circumstances, did the trial judge's charge that

> "The law made these duties personal to the defendant Gariepy, and he could not delegate these duties to the defendant Loechner or the accountants he employed or to any other person whomsoever" (514a)

and the holding of the Court below that

> "the law did impose a non-delegable duty upon appellant to file a correct and accurate income tax return;" (App. 14)

properly state the law with regard to the element of willfulness essential to an income tax evasion charge under Section 145(b) of the Internal Revenue Code of 1939?

3. In an income tax evasion prosecution under 26 U.S.C. Section 145(b), where the jury has recommended leniency on each count and evidenced considerable reluctance in finding Petitioner guilty of the felonies charged, did the trial judge have an obligation to charge the jury, pursuant to Rule 31(c), Federal Rules of Criminal Procedure, that it could find Petitioner guilty of misdemeanors under related statutory provisions (26 U.S.C. Sections 145(a) and 3616(a)) which proscribe conduct similar to that embraced within Section 145(b)?

4. In an income tax evasion case where certain of Petitioner's records were used by the Government in conjunction with other evidence to establish its *prima facie* case, and where the Government had information in its possession tending to destroy the inference which it drew from the records of the Petitioner upon which it relied, and where that information was not then otherwise available to Petitioner, may a trial judge prohibit defense counsel from cross-examining a Government witness, to elicit this information which the witness was at that time prepared to provide?

5. In a criminal trial where a trial judge is concededly "tart" toward defense counsel, prompts the prosecution to make objections, and otherwise evidences hostility to the defense, has an appellate court applied an appropriate standard of review by examining this conduct to determine whether the trial judge exhibited "*such* hostility • • • as to cause a verdict to be rendered against appellant" (App. 19-20) (emphasis added), particularly in view of the jury's recommendation of leniency on both counts of the indictment?

6. Where a jury recommends leniency on each count and evidences considerable hesitance in finding Petitioner guilty

of the offenses charged, do not the prior questions raised, *supra*, when considered together—even if each of them separately may not justify reversal—so taint the proceeding with their cumulative effect as to require that Petitioner be afforded a new trial?

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

The various constitutional provisions, statutes and rules involved in this case are set out in Appendix C, *infra*.

STATEMENT

This case involves the trial of Petitioner for attempting to evade and avoid payment of his income tax for the years 1945 and 1946. He was found guilty by the jury under both counts of the indictment, with a recommendation of leniency on both counts.

Petitioner, Louis J. Gariepy, is a licensed physician practicing in Detroit, Michigan, since 1925 and a surgeon of national repute. He has established and operates a substantial clinic in Detroit, was chief of staff and chief of surgery in one of Detroit's leading hospitals, and has been and is consulting surgeon in numerous other Detroit hospitals (336a-338a, 359a, 377a). He is acknowledged to be a man of great ability and an outstanding technician in his profession. Moreover, according to the record, he is a good husband, a good father, a very religious man, and a person who has engaged in substantial charities (533a).

In 1949, Petitioner's brother, Bernard F. Gariepy, also a medical practitioner in the Detroit area, was indicted and convicted on a charge of income tax evasion. See *Gariepy* v. *United States*, 189 F. 2d 459 (C.A. 6). The Bernard Gariepy case was accorded extraordinary publicity as a result of certain comments made, even before the return of the indictment, by the radio commentator and newspaper columnist, Drew Pearson (16a). The newspaper, radio and television coverage was particularly heavy in the

Detroit area, because of the inclusion in the case of certain sensational claims relating to the Reverend Father Charles E. Coughlin (16a-17a); see 189 F. 2d at 463; *cf. Gariepy* v. *Pearson et al.*, 207 F. 2d 15, 16 (C.A. D.C.), *cert. den.* 346 U.S. 909-10; and 104 F. Supp. 681, 683 (D.C.). Both Bernard Gariepy and Father Coughlin were residents of Oakland County (17a). The trial itself was held in Wayne County (17a). Wayne and Oakland Counties are immediately contiguous and together constitute the bulk of the Detroit metropolitan area.

Subsequent to the Bernard Gariepy trial, a libel action was commenced in early 1950 by Mary G. Gariepy, former wife of Bernard Gariepy, against Drew Pearson.[1] While this case was brought in the District of Columbia, it naturally was treated at length by Detroit newspapers, radio and television stations.

Following the conviction of Bernard Gariepy, and months prior to the indictment of the Petitioner, Drew Pearson predicted Petitioner's indictment on the charge of income tax evasion in nation-wide radio broadcasts and in his nationally syndicated column (18a). This prediction was, as could be expected, also accorded great publicity, especially in the Detroit area, and necessarily revived and fed upon the stories of the prior Bernard Gariepy trial (see e.g. Supplemental Appendix for Appellant).

On March 13, 1952, the indictment against Petitioner was returned. It charged Petitioner, along with Marie L. Loechner, his office nurse, in two counts of attempting to evade and avoid payment of Petitioner's income tax for the years 1945 and 1946 in violation of Section 145(b) of the Internal Revenue Code of 1939 (5a-6a). The treatment accorded by the Detroit press, radio and television coverage of the announcement of this indictment was character-

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[1] *Gariepy* v. *Pearson, et al.*, Civil Action No. 437-50, filed in the United States District Court, District of Columbia, on January 28, 1950. See 104 F. Supp. 681, *rev'd.* 207 F. 2d 15, *cert. den.* 346 U.S. 909-10. The case ultimately culminated in a verdict and judgment for defendants on February 2, 1955.

ized by the front-page eight column headline of the Detroit News of March 13, 1952:

Second Dr. Gariepy Indicted as Tax Cheat,

and continued up to the very eve of the trial (see Supplemental Appendix for Appellant).

Before commencement of the trial, Petitioner filed a motion challenging the array of jurors of the petit jury panel (13a-14a). The motion and supporting affidavit charged that the jury panel consisted of jurors from only two of the sixteen counties which composed the Eastern District of Michigan, Southern Division; that the two counties from which the panel was drawn—Wayne and Oakland—were more strongly subjected to publicity unfavorable to Petitioner than any of the other counties in the Division; that persons from these counties would be more likely to confuse Petitioner with his brother, Bernard Gariepy, and to associate Petitioner with the conviction of his brother on an identical charge than would residents of other counties in the Division; that there had been no association between Petitioner and his brother during the past fifteen years; and that under these circumstances Petitioner would be deprived of his constitutional right to a fair trial before an impartial jury (13a-19a). After oral argument (49a-60a), Petitioner's challenge to the array was denied (60a).

The trial of Petitioner and co-defendant Loechner began on January 5, 1953, and ran approximately two and one-half weeks, with numerous witnesses testifying for the prosecution and the defense. Petitioner took the stand on his own behalf, as did the co-defendant Loechner.

The evidence showed that Petitioner, occupied with the duties of an extremely active surgical practice and the administration of his clinic (338a-340a, 98b), relied upon his employees for the maintenance of his accounting records (367a, 338a-341a, 344a, 358a, 360a-361a); and that the income tax returns upon which the indictment was founded

were prepared by a professional income tax service (101a-102a, 97a, 317a) from information supplied primarily by Petitioner's employees (458a-461a, 463a, 489a, 491a).

The gist of the Government's case was its claim that Petitioner had received taxable income which was not recorded on his books (166b-167b). The Government sought to prove its case primarily through the testimony of a large number of Petitioner's patients who had paid fees to Petitioner (e.g., 105a-167a); and by production of certain records maintained by Petitioner's employees which did not reflect such payment (89a, 94,a 187a-190a, 252a-270a).

So far as is relevant to this Petition, Petitioner's defense was predicated upon two main points:

1. Since Petitioner did not himself maintain the accounting records, nor supervise the keeping of these records by his employees, nor personally prepare his income tax returns, he could not be charged with the personal willfulness or intent necessary to support his conviction under the statute involved.

2. Certain of Petitioner's records, which were relied upon by the Government, were inaccurate in that they actually overstated income from certain sources, and this overstated income offset the fees from patients which were not shown in other records; and, in consequence, that there had been no understatement of income.

The jury rendered a verdict of acquittal for co-defendant Loechner, and found Petitioner guilty on both counts with a recommendation of leniency on each count (532a). Petitioner was sentenced to four years on each count, such sentences to run concurrently, in addition to a fine of $5000 on each count; making a total sentence of four years and a total fine of $10,000 (536a).

On appeal, the Court of Appeals for the Sixth Circuit affirmed (Appendix A, *infra.*)

REASONS FOR GRANTING THE WRIT

I

A. This case presents a substantial question as to the proper adjustment to be made between the rule enunciated by this Court in *Thiel* v. *Southern Pacific Co.*, 328 U.S. 217, 220, that there must be no "systematic and intentional exclusion" of any of the "geographical groups of the community," and the implied exception to this rule contained in 28 U.S.C. 1865(a), that ". . . jurors shall be selected from such parts of the district as the court directs" under certain circumstances defined in the statute. The importance of this question to the everyday operation of the federal court system is too obvious to require comment.

Petitioner's challenge to the array at the outset of the trial raised this question in bold relief. In this case, the petit jury panel was composed of residents of only two of the sixteen counties comprising the judicial district (15a-16a, 49a). Under established practice, apparently pursuant to informal court order, jury panels were selected from residents of at most five[2] of the sixteen counties in the District, and residents of the remaining eleven counties were deliberately and systematically excluded (16a).

Such studied exclusion on the basis of geography is directly contrary to this Court's holding in the *Thiel* case, *supra*. It was there held that

> "The American tradition of trial by jury, considered in connection with either criminal or civil proceedings, necessarily contemplates an impartial jury drawn from a cross-section of the community . . ." 328 U.S. at 220.

And while it was noted that "this does not mean, of course, that every jury must contain representatives of all the economic, social, religious, racial, political and geographical groups of the community," this Court expressly declared that this principle "does mean that prospective jurors shall

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[2] Government counsel stated that "it has been the practice of the court here to order at least jurors from three counties." (53a)

be selected by court officials without systematic and intentional exclusion of any of these groups." *Ibid.*

The residents of the excluded counties in this case, like the excluded wage-earners in *Thiel*, "constitute a very substantial portion of the community, a portion that cannot be intentionally and systematically excluded in whole or in part without doing violence to the democratic nature of the jury system." 328 U.S. at 223; and the purity of the motives of the public officials are irrelevant since a fundamental democratic right is at stake. *Glasser* v. *United States*, 315 U.S. 60, 86.

To justify this exclusion and the apparent violation of *Thiel*,[3] the Court below placed reliance upon 28 U.S.C. Section 1865(a) which provides as follows:

> "(a) Grand and petit jurors shall from time to time be selected from such parts of the district as the court directs so as to be most favorable to an impartial trial, and not to incur unnecessary expense or unduly burden the citizens of any part of the district with jury service. To this end the court may direct the maintenance of separate jury boxes for some or all of the places for holding court in the district and may appoint a jury commissioner for each such place."

As is apparent, this provision does authorize the selection of jurors "from such parts of the district as the court directs" under certain circumstances, and thus requires a delicate balancing of the fundamental principle set forth

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[3] When the *Thiel* decision was called to the attention of the trial judge during the argument on the motion challenging the array (52a), the court stated that "there has been a great deal of water going over the dam since the *Thiel* case" and that it "has been seriously modified" (53a). He was apparently relying upon his own opinion in *Local 36 of International Fishermen, etc.* v. *United States*, 177 F. 2d 320 (C.A. 9) *cert. den.* 339 U.S. 947, in which the question of geographical exclusion was *not* involved. With respect to that case, the trial judge observed that "certiorari was taken and denied by the Supreme Court of the United States, so it has some further authority than my own say-so." (53a)

in *Thiel* and the interests of administrative convenience sanctioned with qualification by the statute.

The cases subsequent to *Thiel* in which the issue of geographical exclusion have been raised, though few in number, have all leaned away from *Thiel* in the direction of administrative convenience. Thus, in *United States* v. *Gottfried*, 165 F. 2d 360 (C.A. 2), *cert. den.* 333 U.S. 860, the practice in the Southern District of New York of selecting jurors from only three counties in the District was sustained. The Court there took only passing note of the *Thiel* decision. It made no effort to reconcile the mandate of *Thiel* with the standards of the statute, and focused instead upon the well-worn maxim that the federal judicial system could not possibly be administered "if it were a condition that the [geographic] divisions made must be so homogeneous that they showed an equal percentage of all possible groups." 165 F. 2d at 364. So also was the restriction to one county in the Northern District of New York upheld in *United States* v. *Titus*, 210 F. 2d 210, 212-213 (C.A. 2); see also *United States* v. *Klock*, 210 F. 2d 217, 220 (C.A. 2), *cert. den.* 347 U.S. 960.

Titus, *Klock*, and the decision below all relied upon the *Gottfried* decision. We believe the *Gottfried* decision to be in error; but in any event, it is manifest that the ruling in *Gottfried* neither discussed nor defined the appropriate relationship between *Thiel* and the statute, and therefore should not be permitted to stand as the sole guide for federal courts throughout the land.

The problem of geographical exclusion from jury panels is likely to arise at least in the numerous judicial districts which include metropolitan areas. Furthermore, it is involved in civil as well as criminal trials, and also in the selection of grand as well as petit juries. The issue thus presented is of fundamental importance to the administration of the federal judicial system within the framework of the Constitutional guaranty of a fair trial, and calls for consideration by this Court.

B. 28 U.S.C. Section 1865(a), the only authority for dilution of the *Thiel* prohibition against geographical exclusion, sets out as criteria the avoidance of "unnecessary expense" or the undue burden upon "the citizens of any part of the district." But the primary criterion, preceding these others, is that any selection of jurors from "parts of the district" must be made "*so as to be most favorable to an impartial trial*" (emphasis supplied). The statutory concepts of convenience or expense are thus expressly made clearly subordinate to the personal right of each defendant to have a fair and impartial jury trial.

In this case, unlike *Gottfried*, Petitioner alleged and demonstrated the likelihood of *actual* prejudice resulting from the geographical constriction of his particular jury panel. He showed that the panel was composed exclusively of residents of those two counties—Wayne and Oakland—which had been the most heavily saturated with newspaper, radio and television publicity adverse to him.[4]

Even the Court below recognized the detrimental effect of this publicity upon Petitioner:

> "The indictment and trial of appellant's brother, Dr. Bernard Gariepy, had received unusual publicity in newspapers published in Wayne and Oakland Counties, as well as from radio and television. After conviction of appellant's brother [*Gariepy* v. *United States*, 189 F. 2d 459 (C.A. 6), supra], the indictment of appellant for income tax evasion had been predicted by radio broadcast, as well as in newspapers published in Detroit. There was no professional association between the brothers Gariepy and, as alleged in the affidavit in support of the challenge to the panel array, there had

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[4] Petitioner here has clearly shown what the Government claimed the petitioner in *Klock* v. *United States*, No. 653, O.T. 1953, failed to show. At page 8, of its *Brief in Opposition*, the Government there argued:

> "Petitioner has not shown, and could not show, that there is something peculiar to the 350,000 people in Onondaga County which sharply distinguishes them from the total population of the Northern District in any way likely to have relevance to this case."

been no 'fraternal association' between them for more than fifteen years. Undoubtedly, appellant received bad press notices in Detroit, where he was engaged in practice." (App. 9)

And the questioning on *voir dire* of the prospective jurors selected indicated that seven of the original twelve, and four additional prospective jurors, had in fact read or heard about the trial of one or the other of the brothers Gariepy (Appendix D, *infra*).

It is no answer to say, as did the Court below, that there was no prejudice because the record did not show impropriety or abuse of discretion in the District Court's examination of prospective jurors on *voir dire* (App. 10-11). "The naive assumption that prejudicial effects can be overcome by instructions to the jury, * * * all practicing lawyers know to be unmitigated fiction." *Krulewitch* v. *United States*, 336 U.S. 440, 453 (Jackson, J., concurring). Under the circumstances presented by this case, the *voir dire* examination was wholly inadequate protection of Petitioner's right to be tried "by an impartial jury of the State and district wherein the crime shall have been committed," *Sixth Amend., U. S. Const.;* by "an impartial jury drawn from a cross-section of the community," *Thiel, supra;* by a jury drawn in a manner "most favorable to an impartial trial," 28 U.S.C. Section 1865(a); and by jurors unaffected by adverse publicity.

As the First Circuit pointed out in *Delaney* v. *United States*, 199 F. 2d 107:

> ". . . No doubt the district judge conscientiously did all he could, both in questions he addressed to the jurors at the time of their selection and in cautionary remarks in his charge to the jury, to minimize the effect of this damaging publicity, and to assure that defendant's guilt or innocence would be determined solely on the basis of the evidence produced at the trial. But * * * one cannot assume that the average juror is so endowed with a sense of detachment, so clear in his introspective preception of his own mental

> processes, that he may confidently exclude even the unconscious influence of his preconceptions as to pro able guilt, engendered by a pervasive pre-trial publicit * * * (199 F. 2d at 112-113). Since he was obliged to stand trial in the hostile atmosphere engender by the extra courtroom publicity, he had little or n reason for assuming that one juror rather than another would be more likely to be influenced, consciously or unconsciously, by his preconceptions * * * " *Id* at 116.

In its reliance upon the therapeutic effect of *voir dire* examination to cure the detriment to Petitioner stemming from the adverse publicity, the decision below clearly conflicts with the position adopted by the First Circuit in *Delaney*. Moreover, Petitioner here was not asking for an indefinite continuance, the denial of which was held reversible error in *Delaney*; or for a change of venue, which was granted because of prejudicial publicity in *United States* v. *Florio*, 13 F.R.D. 296 (S.D.N.Y.). Petitioner sought only that the jury panel be broadened to conform to applicable constitutional and statutory safeguards, thereby to permit the selection of jurors from counties in addition to the two particular counties in which the publicity adverse to him was most strongly concentrated. We are thus presented with the anomaly of a request for lesser relief being denied by the Court below under circumstances which have prompted other courts under similar circumstances to grant even more substantial relief. Such discrepancies in the treatment of a defendant's basic constitutional rights between different courts in the federal judicial system should not be countenanced by this Court.

In cases involving adverse publicity, motions for change of venue or continuance have been denied on grounds such as the failure to allege actual prejudice, or the failure to show that the articles in question were actually read by prospective jurors, or because the newspaper articles were not contained in the appellate record. See, e.g., *Finnegan*

United States, 204 F. 2d 105, 110 (C.A. 8); *United States v. Moran,* 194 F. 2d 623, 625 (C.A. 2), *cert. den.* 343 U. S. 965; *Schino* v. *United States,* 209 F. 2d 67, 70-71 (C.A. 9), *cert. den.* 347 U. S. 937; *Paschen* v. *United States,* 70 F. 2d 491, 495 (C.A. 7). Such defects do not exist in this case. Petitioner alleged actual prejudice, and his verified allegations stand uncontradicted on the record, and in effect have been confirmed by the Court below. Moreover, the *voir dire* examination clearly revealed that the jurors had in fact read the articles alleged to be prejudicial (Appendix D, *infra*); and newspaper articles themselves are contained in the record (Supplemental Appendix for Appellant).

By the same token, the cases where the issue of geographical exclusion from jury panels has been raised, there was apparently lacking an allegation or a showing of actual prejudice, or there existed technical deficiencies in the validity of the challenge to the array. *United States v. Gottfried, supra, United States* v. *Titus, supra, United States* v. *Klock, supra.* Here again, the instant case suffers none of these defects.

This case thus presents in an unique fusion the issue of geographical exclusion from the jury panel combined with the problem of adverse pre-trial publicity. Both of these issues, as presented in this case, are free from those infirmities or defects which have heretofore prompted objection to their consideration by this Court. *Cf. Brief in Opposition of the United States* in *Klock* v. *United States,* No. 653, October Term, 1953, p. 9. Both of these issues are of obvious importance to the fair and efficient administration of justice in the federal courts. Both present important questions of federal law which have not been, but should be, settled by this Court. We think this case contains all the ingredients and is an appropriate vehicle for a clear determination by this Court of the issues involved.

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II

The facts of this case present a second important problem which calls for review by this Court: the extent to which a taxpayer may be held criminally accountable under Section 145(b) of the Internal Revenue Code of 1939—which expressly requires proof of willfulness—where his bookkeeping records are maintained by his employees with practically no supervision from him, and where his income tax returns are prepared by a professional income tax service on information provided almost entirely by the taxpayer's employees.

This Court has emphasized that the inference of willfulness can be drawn validly by the jury only after appropriate proof, and under proper and impartial instructions. *Spies* v. *United States,* 317 U.S. 492, 500; *Holland* v. *United States,* 348 U.S. 121, 128-9; *cf. Morisette* v. *United States,* 342 U.S. 246. Comparison of the charge in this case, and the decision of the Court below sustaining it, with other cases in which a similar problem was involved demonstrates the need for clear and distinct guidance from this Court.

Petitioner, one of the busiest practicing surgeons in the Detroit metropolitan area, during the prosecution years had "at the least" fourteen clerical or technical assistants in his employ (374a). In addition, as consulting surgeon to three hospitals (337a), and as chief of surgery in a fourth (338a), Petitioner's working time was overwhelmingly consumed by his professional obligations. His operating days were Mondays, Tuesdays, Thursdays, Fridays and Saturdays beginning at 7:00 A.M. and frequently running into mid-afternoon. In addition to these scheduled hours, there were, of course, emergencies. After completing his operating work at the hospital, he then received patients at his clinic. On Wednesdays, when Petitioner was not engaged in surgery, at least during 1945, he spent the day examining draftees for different draft boards (339a-340a). In his busy practice he frequently saw more than 50 patients in one day (98b). Moreover, Petitioner held important

positions in professional societies and, indeed, during one of the prosecution years, was the officer responsible for arranging a convention of the International College of Surgeons (346a, 359a). Obviously, with a professional schedule of this nature, Petitioner had little if any time to devote personally to the maintenance of his bookkeeping records or to the preparation of his income tax returns, and necessarily was forced to rely on his employees to take care of these matters for him. Indeed, he presented the "picture" described by the Sixth Circuit in *Wiseley* v. *Commissioner of Internal Revenue,* 185 F. 2d 263, 266 (C.A. 6) "of a very busy doctor's office in wartime."[5]

The record indicates that Petitioner "never had anything to do with the bookkeeping" (367a, 370a). He did not check or inspect any of the bookkeeping records (340a, 361a). His tax returns were completed by a professional income tax service, and he did not himself give any of the information concerning his gross income to that service (357a).

It was the co-defendant, Marie Loechner, who, according to the prosecution itself, got "the figures together for the income tax returns" and "kept his records of collections at the hospital" (174b). It was she who was "doing practically everything." *Ibid.* It was she whom the Government declared had "supervision of the keeping of these records" (62a). Indeed, the record shows that when Petitioner was asked by his own income tax service about the details concerning certain deductions necessary for the preparation of one of the challenged returns, he was unable to answer the questions and telephoned Miss Loechner who was able to supply the information (95a, 415a).

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[5] The Sixth Circuit, in reversing a civil fraud tax case, noted in the *Wiseley* decision that a "doctor's first duty was to his patients and it is not unreasonable to think that his personal affairs underwent a most severe strain." 185 F. 2d at 266. This fact was held to be "vitally material to the proper determination of the question whether petitioner was guilty of fraud with intent to evade the payment of his taxes." *Ibid.*

The Government obviously recognized these facts since it jointly indicted and tried Marie Loechner, not as a conspirator, but as a principal charged with the same substantive offenses as the Petitioner.

In view of this record evidence, the acquittal of defendant Loechner and the conviction of Petitioner strongly suggests that the jury's attention was improperly directed by the trial judge's charge.

A. The defense emphasized that Petitioner had not kept his own books, and believed that the returns were complete and accurate (333a). In consonance with this defense, Petitioner requested instructions which would definitely state that "A willful evasion of the tax requires an intentional act or omission as compared to an accidental or inadvertent one. It also requires a specific wrongful intent to conceal an obligation known to exist, as compared to a genuine misunderstanding of what the law requires or a bona fide belief that certain receipts are not taxable." (542a) Also, ". . . that Congress did not intend that a person by reason of a bona fide misunderstanding as to his liability for the tax, as to his duty to make a return, or as to the adequacy of the records he maintained should become a criminal by his mere failure to measure up to the prescribed standard of conduct." (542a).

These instructions were refused on the theory that the obligation to file and subscribe to an "accurate return, correctly reflecting the amounts of money received by him" (498a) were obligations which could not be delegated in any way.

> "Now, those are obligations which he can't escape. If it is necessary to keep records in order for him to correctly and accurately make such a return, all right. If he is not a bookkeeper, he better hire somebody that is a good bookkeeper. The responsibility is upon him . . ." (499a)

On this theory, the judge charged, *inter alia*, in such a manner as to give the jury the impression that the law

imposed a personal, non-delegable, and absolute duty upon the taxpayer to file a return correct in every material particular, without regard to "absence or press of business" (513) on pain of incurring criminal culpability. It "was the duty of the defendant to file an income tax return which correctly and accurately represented all of the income of the defendant Gariepy for the years 1945 and 1946 respectively" (513a). This definition of the personal "duty" of Petitioner occupies some half dozen paragraphs of the charge (512a-514a).[6]

The refusal to grant the charges requested by Petitioner, and the improper emphasis in the charge on the absolute, or non-excusable, obligation personally to file an accurate return, in effect removed the theory of the defense from the jury's consideration. The trial judge failed to summarize the facts supporting Petitioner's defense, as he did those supporting the defense of his co-defendant, who

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[6] The critical paragraphs of this portion of the charge were:

"This duty of filing a correct and accurate return was personal to the defendant Gariepy. He was required to take all measures necessary to file a correct and accurate return for each of these years; and if the filing of accurate returns could only be accomplished by keeping complete records and could not be fulfilled by keeping records which did not reflect all the income which he received, and particularly payments of cash from surgical patients, if you find that those were missing, if it was necessary for the filing of a complete and accurate income tax return for each of the years that all the records be turned over to the persons preparing the return, then that duty was incumbent upon the defendant. This was the personal responsibility and duty of the defendant Gariepy under the law, and if the personal diagnosis records of the individual patients were necessary for a complete and accurate return, it was the duty of the defendant to turn these over, or the information contained on them, to whosoever was to prepare the returns.

"The law made these duties personal to the defendant Gariepy, and he could not delegate these duties to the defendant Loechner or the accountants he employed or to any other person whomsoever." (513a-514a)

was acquitted.[7] And in affirming the charge on this issue, the Court below repeated the error of the trial court,[8] for it is well established that a defendant is entitled "to have his defenses clearly and fairly put in a charge to the jury." *Jones* v. *United States*, 164 F. 2d 398, 400 (C.A. 5); *cf. United States* v. *Phillips*, 217 F. 2d 435, 441 (C.A. 7).

B. Minimizing in the charge the facts that Petitioner neither made out his returns nor kept his books, was in practical effect to impute to Petitioner knowledge and intent which he did in fact not have; and thereby automatically and irrebuttably to impose responsibility upon him for the errors of accounting omission and commission which occurred as the result of the actions or failures to act of his employees and agents.

Certainly this is not the law. As the Court below itself has noted on another occasion: "The doctrine of *respondeat superior* is not to be drawn from the law of negligence and applied to criminal liability." *Lurding* v. *United States*, 179 F. 2d 419, 421 (C.A. 6). "The general rule in civil cases is that a taxpayer is responsible for the acts of his agent and cannot escape liability by claiming that he himself did not commit fraud. There is a distinction between civil and criminal cases in this respect. In criminal

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[7] Only one sentence in the charge suggested the validity of Petitioner's theory that he could not "be held guilty simply because he was a poor bookkeeper . . . or that he was pressed by the amount of business that he was doing" (517a); whereas much greater comment and emphasis was contained in the charge as to the elements to be considered in determining the complicity of Petitioner's co-defendant (521a). In view of the fact that the Government asserted that co-defendant Loechner had been "doing practically everything" with regard to the books, *supra* p. 17, and Petitioner's relationship to the bookkeeping was at best indirect, the trial court's emphasis appears strangely transposed.

[8] The Court below held: "The law did impose a non-delegable duty upon Appellant to file a correct and accurate income tax return," and cited, *inter alia*, *Banks* v. *United States*, 204 F. 2d 666, 673 (App. 14), which earlier had been reversed by this Court and remanded for reconsideration, 348 U.S. 905-6.

cases, there must be a willfulness involving an element of evil motive, and the problem of proving the commission of a crime through agents is, therefore, a different matter." 10 *Mertens, Law of Federal Income Taxation,* Sec. 55.41 (1948 Rev. Ed.)

This erroneous assumption underlying the trial judge's approach to the whole case was made express in at least one portion of the charge, where he instructed the jury that "The defendant Gariepy *must* be taken to have had knowledge that his income for the calendar years 1945 and '46 was *as stated by the accountants* in the purported tax returns for those years respectively." (517a) (Emphasis added). This reference to an unchallengeable and unchangeable presumption that what the bookkeepers knew and did is criminally equivalent to what Petitioner knew and did, coming in the context of the discussion of willfulness, was prejudicial error which could not be corrected by other statements in the charge. And while the Court below dismissed this contention with the observation that this was "lifting out of context an isolated paragraph of a charge" (App. 12), it apparently overlooked its own earlier recognition of the obvious principle: "While the effect of an observation may not adequately be appraised when torn from its context, nevertheless it is the very tendency to do so that is guarded against." *Heindel* v. *United States,* 150 F. 2d 493, 497 (C.A. 6).

The Fifth Circuit has reversed convictions in income tax evasion cases where charges similar to the one here were given. Thus it held that a charge to the effect that:

> "you may find from the facts that the defendant signed his individual income tax returns that he had knowledge of the contents of the return.
>
> "The owner of a business need not be the actual bookkeeper to be familiar with the affairs and finances of that business, but he must be held to know that which it is his duty to know."

constituted error. *Berkovitz* v. *United States,* 213 F. 2d 468, 476 (C.A. 5); *cf. Wardlaw* v. *United States,* 203 F. 2d

884, 793-4 (C.A. 5); *Vloutis* v. *United States,* 219 F. 2d 782 (C.A. 5). And the Eighth Circuit has similarly reversed a conviction for income tax evasion where the trial court charged that "no man • • • is able to escape the responsibility at least of good faith and ordinary diligence as to the correctness of the statement which he signs, whether prepared by him or somebody else." *Hartman* v. *United States,* 215 F. 2d 387, 394-5 (C.A. 8). And in *Gordon* v. *United States,* 347 U.S. 909, 910, which was not an income tax evasion case, this Court, after confession of error by the Government, held:

> "The jury was instructed that the knowledge of petitioners' employees was chargeable to petitioners in determining petitioners' willfulness. Because of the instruction, the government has confessed error. We agree, and accordingly reverse the judgment and remand the case to the district court for re-trial."

The decision of the Court below when compared to the decisions of other Circuits indicate that both appellate and trial courts are badly in need of further guidance from this Court as to the criteria to be applied where the criminality of a taxpayer is predicated in large part upon records which he himself did not keep and income tax returns which he himself did not prepare.

III

Since the jury in this case was obviously struggling and laboring to find an alternative between acquittal and conviction of Petitioner for the felonies charged, this Court should notice as plain error the absence in the charge of any reference that the jury might find the Petitioner guilty of misdemeanors. The charge was confined to 26 U.S.C. Sec. 145(b), a felony provision, and did not

mention either 26 U.S.C. Sec. 145(a)[9] or 26 U.S.C. Sec. 3616(a)[10], which establish as misdemeanors conduct similar to that embraced within Sec. 145(b). Thus, Petitioner was deprived of the benefit of Rule 31(c), Federal Rules of Criminal Procedure,[11] which expressly authorizes a jury to return a verdict of guilty "of an offense necessarily included in the offense charged."

This case therefore presents the same issue which is presented in *Dillon* v. *United States*, No. 629, October Term, 1954, in which certiorari has been granted, with the added circumstance of the jury recommendation of leniency. In this case, however, unlike *Dillon, supra*, no request to charge the lesser offense was made to the trial judge, but a closely related point was presented in

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[9] 26 U.S.C. Section 145(a) provides:

"Any person required under this chapter to pay any estimated tax or tax, or required by law or regulations made under authority thereof to make a return or declaration, keep any records, or supply any information, for the purposes of the computation, assessment, or collection of any estimated tax or tax imposed by this chapter, who willfully fails to pay such estimated tax or tax, make such return or declaration, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than one year, or both, together with the costs of prosecution."

[10] 26 U.S.C. Section 3616(a) provides:

"Whenever any person—

"Delivers or discloses to the collector or deputy any false or fraudulent list, return, account, or statement, with intent to defeat or evade the valuation, enumeration, or assessment intended to be made; or

"* * * he shall be fined not exceeding $1,000, or be imprisoned not exceeding one year, or both, at the discretion of the court, with costs of prosecution."

[11] Rule 31(c), Federal Rules of Criminal Procedure, provides:

"The defendant may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein if the attempt is an offense."

and expressly rejected by the Court below (App. 11-12). Nevertheless, in the event that this Court should hold in *Dillon* that a trial judge must charge in a Section 145(b) prosecution with regard to the lesser offenses of either 145(a) or 3616(a), this Petitioner will have been denied by a mere accident of chronology important safeguards which will henceforth be available to other defendants.

In view of the jury's obvious doubts and very great hesitance in finding Petitioner guilty of the felonies charged, as evidenced by its recommendation of leniency, this Court should exercise its well established authority to have the right of the case prevail, Rule 40 1.(d)(2), *Revised Rules of the Supreme Court; Wiborg* v. *United States,* 163 U.S. 632, 658; and should consider the aspect of the *Dillon* problem presented in this case.

IV

It was the Government's claim in this case that Petitioner's reported income had been derived from the sum total of the amounts reflected in the so-called "black books" (in which were recorded payments from individual patients) plus the amounts received from insurance companies as reflected in the so-called "insurance books"; and that a number of payments made by patients to Petitioner did not appear in either the black books or the insurance books; and therefore, that the income from such payments had not been reflected in Petitioner's income tax returns (166b-168b; App. 16).

One of Petitioner's principal defenses was that the income attributed by his employees to certain insurance companies in the insurance books was overstated: i.e., more income was shown in the insurance books as having come from insurance companies than was actually received from them (361a). If this contention had been proved, a basic peg in the prosecution's case would have been knocked out. For income improperly attributed by Petitioner's employees to insurance companies could well

have been the income claimed by the Government as otherwise unreported, with the result that Petitioner's income tax returns could have accurately stated the gross amount, while inaccurately labelling the components. Obviously, in the interests of an informed and impartial verdict, it was vital to develop fully and in detail any and all facts supporting the defense contention regarding the overstatement of insurance company income.

Petitioner sought to establish this contention by examination of insurance company officials and records, but the results were not conclusive because the records were either unavailable, destroyed, or incomplete (431a-444a). However, to the extent that some insurance company records were available, substantial discrepancies seemed to exist between the amounts reflected in the insurance books as having been received, and in the records of the insurance companies as having been paid; and in each available instance, the insurance books showed greater amounts as received than the companies' records showed as having been paid.[12]

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[12] A compilation of the available figures in the record indicates the following:

	1945	
Exhibit No. 112 (John Hancock)	$6,060.00	(189a)
John Hancock Official Records	$1,390.00	(434a)
	1946	
Exhibit No. 113 (John Hancock)	$2,825.00	(187a)
John Hancock Official Records	$ 720.00	(434a)
	1945	
Exhibit No. 112 (Travelers)	$3,475.00	(189a)
Travelers Official Records (not more than)	$ 500.00	(437a)
	1946	
Exhibit No. 113 (Travelers)	$1,200.00	(187a)
Travelers Official Records (not more than)	$ 500.00	(437a)
	1945	
Exhibit No. 112 (American Hospital Benefit)	$4,328.75	(189a)
American Hospital Benefit Official Records	$1,445.70	(432a)
	1946	
Exhibit No. 113 (American Hospital Benefit)	$4,591.40	(187a)
American Hospital Benefit Official Records	$1,238.05	(432a)

Towards the conclusion of the Government's case in chief, the prosecution called as a witness the Treasury Agent who had supervised the main part of the investigation preparatory to trial (275a, 278a). He testified broadly both as to the "black books" and the "insurance books" and generally summarized the case for the prosecution (253a-275a).

On cross-examination, Petitioner's counsel asked this witness whether he had been instructed to direct his investigation "toward the possibility of overpayments on the so-called insurance accounts" (276a). After the witness had answered affirmatively, he was asked if he could verify whether the amounts recorded in the insurance books as having been received from the insurance companies were an accurate reflection of the amounts the insurance companies had in fact paid Petitioner. (276a-279a) While the witness was prepared to answer this question after refreshing his recollection from investigative memoranda, the trial court, after prompting the Government to object, sustained an objection. (279a)

The trial judge gave a number of different grounds for curtailing this line of questioning: First, that "the best evidence of what the amount was would be the records of the insurance company" (279a); second, "he says he doesn't know" (280a); third, that the questioning "was with reference to a document that isn't here, • • • and document which he didn't make" (280a); and fifth, it is absolutely immaterial what this agent found out or anybody else, and I don't think—you can ask that on cross-examination" (283). Later, in his charge to the jury, the trial judge went even further and characterized the information which the defense had sought to elicit as "immaterial" and having "absolutely nothing to do with this case." (512a)

When this drastic restriction on cross-examination was protested in the Court of Appeals, that Court sustained the trial judge for two apparent reasons: that the defense failed to call the government agents who had made investi-

gations of certain insurance company records; and that the defense should not have relied upon cross examination as the means of eliciting this information (App. 17).

In so holding, the Court below overlooked the fact that the agents, if called and if they in fact had the information being sought, undoubtedly would have been prevented from testifying by the trial court. The trial court apparently relied chiefly on the best evidence rule and on the complete immateriality of the results of the Government's investigation; on these grounds he would clearly have sustained the promised Government objection to any testimony by any agent as to any investigation of any records of any insurance company. Furthermore, the Court below unjustifiably sought to dictate the manner in which the defense should have proceeded in the trial. If the cross-examination were proper, and we submit it was, whether defense counsel should or should not have relied upon it as a means of eliciting this necessary information is irrelevant.

Moreover, since this information was essential to the prosecution's case, it was the unquestioned right of the defense to rebut the inferences which the Government sought to draw from the testimony in question, and thereby to destroy a vital link in the prosecution chain during the prosecution's case—not after a possibly improper inference was planted in the mind of the jury. In *Ford* v. *United States,* 210 F. 2d 313, 319 (C.A. 5), the court held it reversible error in a tax case to restrict the right of defense counsel to cross-examine a government agent in order "to rebut the inferences to be drawn from the witness' direct testimony." See also *Dickson* v. *United States,* 182 F. 2d 131, 134 (C.A. 10).

In frustrating the efforts to prove Petitioner's innocence by cross-examination of a prosecution witness, the court below violated the plain teaching of this Court and the consistent approach of other circuits. "Cross-examination of a witness is a matter of right . . . counsel often

cannot know in advance what pertinent facts may be elicited on cross-examination. . . . It is the essence of a fair trial that reasonable latitude be given to the cross-examiner . . . The trial court cut off *in limine* all inquiry on a subject with respect to which the defendant was entitled to a reasonable cross-examination. This was an abuse of discretion and prejudicial error." *Alford* v. *United States*, 282 U.S. 687, 691, 692, 694. See also, *Reilly* v. *Pinkus*, 338 U.S. 269, 275-7.

While the rule is often stated that the control of the right of cross-examination is within the discretion of the trial judge, it "is only after the right has been substantially and fairly exercised that the allowance of cross-examination becomes discretionary." *Arnold* v. *United States*, 94 F. 2d 499, 506 (C.A. 10); *J. E. Hanger, Inc.* v. *United States*, 160 F. 2d 8, 10 (C.A.D.C.). See also *United States* v. *Klock*, 210 F. 2d 217, 222, 224 (C.A. 2), *cert. den.* 347 U.S. 960; *Tivoli Realty* v. *Paramount Pictures*, 209 F. 2d 41, 43 (C.A. 5).

But the question presented on this point in this case goes far beyond the extent to which a trial court may curtail cross-examination. It raises the more fundamental question of the position of the Government and its relationship to the defense in a criminal prosecution.

For this Court has said that "The United States Attorney is representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done." *Berger* v. *United States*, 295 U.S. 78, 88. In this spirit, other Courts of Appeals have emphasized the "necessity of disclosure by the prosecution of evidence that may reasonably be considered admissible and useful to the defense. When there is substantial room for doubt, the prosecution is not to decide * * * for the defense what is useful." *Griffin* v. *United States*, 183 F. 2d 990, 993

(C.A.D.C.), *cert. den.* 33 U.S. 857. The Sixth Circuit has held it to be error to deny to defendants the right to submit evidence to the jury which "might have a tendency to demonstrate, however slight such demonstration might be, that they were honest and not dishonest persons in their dealings with the government." *Heindel* v. *United States,* 150 F. 2d 493, 497.

As recently as this term, this Court has made clear the particular and specific applicability of this principle to the trial of criminal tax cases. In *Holland* v. *United States,* 348 U.S. 121, this Court observed:

> "*When the Government fails to show an investigation into the validity of such leads* [i.e., leads furnished by the taxpayer], *the trial judge may consider them as true and the Government's case insufficient to go to the jury.* This should aid in forestalling unjust prosecutions, and have the practical advantage of eliminating the dilemma, especially serious in this type of case, of the accused's being forced by the risk of an adverse verdict to come forward to substantiate leads which he had previously furnished the Government. *It is a procedure entirely consistent with the position long espoused by the Government, that its duty is not to convict but to see that justice is done.*" 348 U.S. at 135-6 (Emphasis added).

And while this observation was directed particularly to the trial of net worth cases, what was said is applicable also to other types of tax evasion cases. Cf. *Dupree* v. *United States,* 218 F. 2d 781, 783 (C.A. 5).

This Court has thus emphasized the obligation of the Government to investigate leads furnished by the defense, to make certain that any relevant facts bearing upon a taxpayer's innocence might be ascertained or developed. In this case, as the record makes clear, the Government had in fact investigated, had ascertained and had in its possession conveniently accessible, the facts which the defense properly sought to bring to the jury's attention—and which were not then otherwise available to the defense. If, in accordance with the admonition in *Hol-*

land, the Government violates its duty by failing to investigate leads furnished by a taxpayer, then in this case the Government has *a fortiori* violated its fundamental obligation "to see that justice is done." The trial court's answer that "it is absolutely immaterial what this agent found or anybody else . . ." (283a) and that "what the results of the investigation were have absolutely nothing to do with this case" (512a); and the affirmance of this ruling by the Court below; are all in direct and inexcusable conflict with this Court's decision in *Holland.*[13]

V

A catalogue of specific incidents and colloquies demonstrating the hostile attitude of the trial judge towards Petitioner and his counsel have been set in Appendix E to this Petition. These episodes run the full gamut: from blunt and direct remarks deprecating the efforts and contentions of the defense, both in and out of the presence of the jury, to more subtle rulings on evidence and law which had the effect of constricting Petitioner's defense within a rigid and sometimes unbearable framework. Even the Court below, deferential as it was to the "distinguished trial judge," acknowledged that he "was at times quite tart toward appellant's counsel in his rulings and comments." (App. 19).

Petitioner's claim that the trial judge was hostile, made in the Court below, was rejected by that Court with the observation:

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[13] The decision below was issued on March 9, 1955, approximately four months following the issuance of the *Holland* decision. There is no indication that the *Holland* decision was examined in the consideration of this appeal. Indeed, the evidence is to the contrary in view of the fact that the Court below cited in its opinion *Banks* v. *United States,* 204 F. 2d 666 (C.A. 8), *cert. den.* 346 U.S. 857. (App. 14-15) A petition for certiorari in the *Banks* case was granted by this Court on January 10, 1955, the judgment of the Court of Appeals was vacated, and the case remanded for consideration in the light of the *Holland* and accompanying decisions. 348 U.S. 905.

"We are not convinced that he transcended the bounds of propriety or exhibited an attitude of *such hostility* * * * *as to cause a verdict to be rendered against appellant* which otherwise would not have been found by the jury." (App. 19-20) (Emphasis added.)

We submit that this test applied by the Court below was erroneous because it completely disregarded Petitioner's constitutional right to a fair and impartial trial and was predicated instead upon the conclusions of the Court below that Petitioner was guilty. The summary of the evidence against Petitioner made by the Court below, which consumes about one half of its lengthy opinion (App. 1-9), is a clear manifestation of this attitude. And when the Court below rejected Petitioner's claim that the trial judge was hostile, it held that despite the fact that the trial judge "was at times quite tart," this conduct could be excused because "the evidence of appellant's guilt of the crimes charged was adequately substantial." (App. 20).

But the issues presented in this Petition are addressed to the fairness of criminal trials in the federal courts, and apply without regard to the appellate court's opinion of the guilt or innocence of Petitioner. This Court has repeatedly emphasized that trial errors are not to be dismissed as harmless because guilt may seem clear. "We are not authorized to look at the printed record, resolve conflicting evidence, and reach the conclusion that the error was harmless because we think the defendant was guilty." *Weiler* v. *United States,* 323 U.S. 606, 611.

". . . the question is not whether guilt may be spelt out of a record, but whether guilt has been found by a jury according to the procedure and standards appropriate for criminal trials in the federal courts. * * * the judicial pendulum need not swing to presuming all errors to be 'harmless' if only the appellate court is left without doubt that one who claims its corrective process is, after all, guilty. In view of the place of importance that trial by jury has in our Bill of Rights, *it is not to be supposed that Con-*

gress intended to substitute the belief of appellate judges in the guilt of an accused, however justifiably engendered by the dead record, for ascertainment of guilt by a jury under appropriate guide, however cumbersome that process may be." *Bollenbach* v. *United States,* 326 U.S. 607, 614, 615. (Emphasis added.)

The test of the Court below that the hostility of the trial judge was not "such * * * as to cause a verdict to be rendered against appellant" is also wrong because it completely overlooks the subtle and unconscious effect upon the jury which the comments and actions of the trial judge can have. So great is the influence of the trial judge upon the jury that his very "intonations and gestures," *Billeci* v. *United States,* 184 F. 2d 394, 402 (C.A.D.C.), "his facial expressions," *Butler* v. *United States,* 188 F. 2d 24, 25 (C.A.D.C.), may constitute reversible error. If there is even the "chance" of any unfairness to the defendant because of the conduct of the trial judge, reversal is required. *Schmidt* v. *United States,* 115 F. 2d 394, 398 (C.A. 6), for a criminal trial should be held in an "atmosphere of judicial calm." *Moskum* v. *United States,* 143 F. 2d 129, 130 (C.A. 6).

Where there is more than one episode at the trial where the trial judge exhibits hostility against a defendant or his counsel, the possible cumulative effect of all such episodes upon the jury must be considered on appeal. See *Kotteakos* v. *United States,* 328 U.S. 750, 763-5. For if the trial judge "indicating at times hostility" may have influenced the jury, an appellate court "is barred from sustaining the judgment as the product of a fair and impartial trial." *Peckham* v. *United States,* 210 F. 2d 693, 702 (C.A.D.C.); and this, even if any single episodes might not justify reversal. *Ibid.*

Only recently, this Court manifested its concern over the hostile conduct of a trial judge, considering the record as a whole; and summarily reversed a federal criminal conviction "in the interests of justice and in the exercise

of the supervisory powers of this Court," remanding the case "for retrial before a different judge." *Calvaresi* v. *United States*, 348 U.S. 961.

Some of the specific instances of the trial judge's hostility in this case apparently would have prompted reversal in other circuits. For example, on a number of occasions the trial judge here advised the prosecution whether or not it was proceeding properly, and indicated to the jury that prosecution evidence had been properly connected up as the court had desired. (135a, 235a, 253a, 87b-88b) Similar conduct was held to require reversal in *United States* v. *Wheeler*, 219 F. 2d 773 (C.A. 7), where the Seventh Circuit declared:

> "We think it was error to volunteer the statement in the presence of the jury that the objection which the Government finally made was the one the trial judge had been waiting for, and he sustained the objection with considerable vigor and enthusiasm." *Id.* at 777.

Similarly, the same circuit in another case objected because the trial judge had advised the prosecution to "go back and pick up" a previous conversation, so as to complete the testimony: "it is no part of a judge's duty to caution or advise the prosecuting attorney in order to supply some deficiency in the proof or testimony favorable to the government." *United States* v. *Carengella*, 198 F. 2d 3, 8 (C.A. 7), *cert. den.* 344 U.S. 881.[14]

Certainly the test applied by the Court below violates this Court's oft-repeated admonition that "to perform its

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[14] The following was one of a number of suggestions made during the trial by the judge to the Government Counsel:

> "The Court (Interposing): I understand those are the amounts. If he has any amounts in the books, I think he will have to tell what they were; otherwise this won't amount to anything" (253a).
>
> • • • • •
>
> "The Court: This is going to be somewhat tedious; but I think the testimony would be incompetent unless you go through that formula." (254a)

high function in the best way 'justice must satisfy the appearance of justice.' *Offutt* v. *United States,* 348 U.S. 11." *In the Matters of Murchison and White,* — U.S. —. And all of these prescriptions are especially applicable to this case in view of the jury's recommendation of leniency—for error, normally harmless, achieves special dignity and force under such a circumstance. See Point VI, *infra,* pp. 35-6.

VI

As the preceding discussion makes clear, the trial of this case was held in an atmosphere of less than "judicial calm" and impartiality, and was marked by serious errors in the application of substantive law. Even if any one of these issues "singled out and standing alone" may not in and of itself justify review and reversal of this conviction by this Court, we submit that when these errors are taken together their cumulative effect is clearly such as to constitute a denial of due process of law.

> ". . . if one cannot say with fair assurance, after pondering all that happened, without stripping the erroneous action from the whole, the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected." *Kotteakos* v. *United States,* 328 U.S. 750, 765.

In this case, moreover, Petitioner's trial must be scrutinized especially closely, because of the obvious reluctance of the jury to convict. The jury recommended leniency for the Petitioner on each count; and, indeed, interrupted its deliberations to inquire whether a recommendation of mercy could be made as to one or both defendants, and did not render its verdict until the Court had assured it that any such recommendation would be given "full consideration." (531a)

Under those circumstances, the principle set forth by this Court in *Glasser* v. *United States,* 315 U.S. 60, is directly applicable: "In all cases the constitutional safeguards are to be jealously preserved for the benefit of the

accused, *but especially is this true where the scales of justice may be delicately poised between guilt and innocence. Then error, which under some circumstances would not be ground for reversal, cannot be brushed aside* as immaterial since there is a real chance that it might have provided the slight impetus which swung the scales toward guilt." 315 U.S. at 67 (Emphasis added). "In these circumstances prejudice to the cause of the accused is so highly probable that we are not justified in assuming its non-existence." *Berger* v. *United States,* 295 U.S. 78, 89.

Despite the fact that the jury was most reluctant to convict Petitioner and obviously appraised the case against him as "weak," neither the trial court nor the Court below appear to have given the jury's recommendation of leniency any consideration. Certainly the Court below did not honor the leniency recommendation as a factor which required an assidious examination of the record to insure that Petitioner had been accorded an absolutely impartial trial.

In this purposeful failure, the decision below appears to be in direct conflict with decisions of this Court, *Glasser* v. *United States, supra; Berger* v. *United States, supra,* and also does not comport with the decisions of other circuits. Thus, in *White* v. *United States,* 216 F. 2d 1, 7 (C.A. 5), the Fifth Circuit decided an evidentiary issue by holding that "The jury in its verdict recommended clemency. We cannot say that, if this letter had been before the jury, it might not have returned a verdict for the defendant." And the Seventh Circuit held it was bound to notice any errors on the record, even though no objection had been raised and the errors would ordinarily not be considered grounds for reversal, solely because the case against the appellant was "weak." *United States* v. *Levi,* 177 F. 2d 827, 830-831 (C.A. 7); and the Eighth Circuit, in *Echert* v. *United States,* 188 F. 2d 336, (C.A. 8), upset an income tax conviction holding that the conduct of the prosecutor and the trial judge, while not prejudicial in the usual context, necessitated a reversal because of the inevitable impact

upon a jury where the *jury* did not regard the case against the defendant as "overwhelming." 188 F. 2d at 342.

Where—as here—a criminal trial is had before a jury selected from a panel which has been restricted solely to those counties which have been most heavily saturated with continuous publicity adverse to a defendant for the years preceding the trial in all media of communication, and before a judge who throughout the proceedings evidenced hostility to the defendant and his counsel, it would seem clear that there has been a substantial denial of that defendant's right to a fair trial. And this denial becomes all the more critical when to it is added a serious restriction upon the defendant's opportunity to cross-examine on factual matters vital to his defense in possession of the prosecution and unavailable to him. And when in combination with the foregoing, the court's instructions to the jury upon a fundamental element in the case were confusing, apparently erroneous, and certainly unfairly weighted in favor of the prosecution, there is presented a compelling instance for the exercise of this Court's "supervisory authority over the administration of criminal justice in the federal courts," *McNabb* v. *United States,* 318 U.S. 332, 341; *Offutt* v. *United States,* 348 U.S. 11; *Calvaresi* v. *United States,* 348 U.S. 961.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX

APPENDIX A

Opinion of the Court Below

No. 12061

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

LOUIS J. GARIEPY, *Appellant*,

v.

UNITED STATES OF AMERICA, *Appellee*.

Appeal from the United States District Court for the Eastern District of Michigan.

Decided March 9, 1955.

Before Martin, McAllister and Stewart, Circuit Judges.

Martin, Circuit Judge. Appellant, Louis J. Gariepy, a Detroit doctor specializing in surgery and enjoying a lucrative practice, was convicted by jury verdict on two counts of an indictment charging him with violation of section 145(b) of the Internal Revenue Code, 26 U. S. C. A., 145(b). He was sentenced to four years' imprisonment on each of the two counts, the sentences to run concurrently, and was fined $5,000 on each count. His office nurse and confidential financial secretary, Marie L. Loechner, who had been jointly indicted with him, was acquitted by the verdict of the jury.

Before returning its verdict, the jury inquired as to whether it "could return a verdict of guilty as to one of the defendants and make a recommendation of mercy." The judge replied affirmatively, but told the jurors that the recommendation would not be binding upon the court. He assured them, however, that their recommendation would be given "full consideration in any consequences that may follow." When subsequently pronouncing sentence on appellant, the judge stated that he had considered the proba-

tion report and, "chiefly," the recommendation of mercy made by the trial jury. He asserted that the evidence of guilt of the appellant was overwhelming, and that had the jurors failed to return a verdict of guilty they would have violated their oaths and simply would have pardoned the defendant. He said that appellant had had a fair trial and that his rights had been properly protected, "both by eminent and able counsel and also by the court."

The court was impelled to find that appellant had committed perjury, inasmuch as he knew that he had understated his income; that the doctor had wilfully thrown obstacles in the way of the investigating officers over a long period of time; that he had deliberately destroyed his records and thereby prevented the revelation of the extra sums of money which he had received; and that he had done this after the revenue officers had visited his offices for the purpose of examining his records. The judge considered that he would be recreant in his duty if he failed to impose a sentence which the facts required—not only because the defendant was a man of high reputation in his community, but also because of the example set for people of no influence who would be brought before the criminal bar of the court.

The income tax returns of Dr. Gariepy for the respective years involved—1945 and 1946—were not signed by him, but had been prepared by his employee, the Rex Beasaw Income Tax Service, from information obtained from the co-defendant, Marie Loechner, who had secured the data in the defendant's office and from the so-called Rex "black books" which were daily record books of receipts and disbursements. The entry of income had been regularly made by Mrs. Lucille Baldinger, receptionist and bookkeeper for the doctor during 1945 and until August of 1946. Disbursements had been entered in these books by Miss Loechner. Payments for major surgery, however, had been deliberately omitted from the "black books" during 1945 and partially during 1946, although, in the latter year, some surgi-

cal fees had been entered. The appellant had directed the transmission of the information furnished the Rex Beasaw Service. The record discloses that he was informed as to the system of bookkeeping employed in his office and kept in touch with his business records.

Mrs. Baldinger testified that appellant would "glance" at her entries in the black books and that on one occasion when he observed that the entry of a surgical charge had been made in one of these books had said: "That should be on the account sheet and filed in the closet." The witness testified further that she would either place the account sheets on Dr. Gariepy's desk with the mail, or would take them into his office and show them to him. These were the yellow account sheets on which surgical charges were entered. They were kept, so she said, in a filing cabinet in a closet of the front office. The surgical cases and the non-surgical cases were handled in an entirely different manner, the record of surgical cases being placed in the closet at the end of each day. The open account sheets were kept in the top section of the cabinet and the closed accounts in the bottom section.

Both Dr. Gariepy and Miss Loechner had informed Mrs. Baldinger of the payment of surgical fees so that she could make appropriate entries on the account sheets kept in the closet. Mrs. Baldinger testified that at the end of each day, she would put into a large envelope all the checks and cash received by her during that day, with a notation of the total amount, and would give the envelope to Dr. Gariepy before he left the office. Dr. Gariepy stated that he turned over these receipts to his wife, who made the bank deposits. When she was out of town, a long-time associate of his in the x-ray department would substitute for her in making the deposits.

Revenue Agent Price testified that, when the government investigation began, he was told by Dr. Gariepy that his entire set of books consisted of the "black books"and a commercial check book. When he questioned Dr. Gariepy about

his accounts receivable, the doctor stated that he destroyed the record of an account when it was paid; and that he did not maintain an accounts receivable ledger, or duplicate receipts. The revenue agent was shown a sample of the yellow cards upon which patients' accounts are kept, but was told by the doctor that, because the medical history of the patients appeared on the cards, they could not be made available to the agent. When the doctor was informed that it would be necessary to inspect the hospital records in order to determine his income, he admitted that he had duplicate receipts and suggested that these be used by the investigators for that purpose. Shortly thereafter, he stated that he could not furnish the receipt books because they had been destroyed. He explained that Special Agent Kitchen, who was not investigating his returns, had telephoned him concerning the tax liability of his brother; and that the agent informed him that his [appellant's] income tax had been closed and that it was, therefore, unnecessary that the doctor preserve these records. Special Agent Kitchen denied that he had made any such statement to Dr. Gariepy.

The most convincing evidence of Dr. Gariepy's guilt was that, after he knew his income tax returns were being investigated, he deliberately removed from the closet in his office the yellow sheet records of his paid surgical fees and transferred them to the attic of his home. He admitted that he had personally transported them in suitcases at intervals and had permitted them to be destroyed while his house was being cleaned and redecorated. The jury obviously did not believe his rather incredible excuse for destroying important records—that a revenue agent who was not even working on his case had told him that the case against him was closed.

Numerous patients of Dr. Gariepy were called as government witnesses and testified that, during 1945 and 1946, they had made payments to the doctor, or to his nurse or other representatives, for professional services in various

amounts from $50 to $500. Most of these patients had receipts or cancelled checks in support of their testimony. The inference is plain, therefore, that payments made to the doctor for professional services to these patients had not come from and were not made by insurance companies listed on Exhibits 112 and 113, which were made up by the revenue agents from information in the insurance record books kept by Miss Loechner.

Revenue Agent Philpott testified that, upon examination of the black books, he had found no reference to the payments which the patients claimed to have made. He swore that in numerous instances he found an entry, "NC," in the receipt column of a patient who testified that he, or she, had paid the doctor. Dr. Gariepy explained that the entry "NC" meant that no charge had been made. The witness, Philpott, testified further that an examination of the duplicate receipt book covering the period from August 3 to August 21, 1945, showed fourteen duplicate receipts ranging in amount from $27 to $250. These had not been recorded in the black books. He found four items, corresponding in date with the date of receipts, carrying the entry "NC" following the respective names of the patients.

Another government witness testified that he had computed the additional income revealed by testimony of patients and found that Dr. Gariepy's unreported income amounted to $18,255 for 1945 and $11,733 for 1946. From this, he calculated that the doctor's tax had been understated on his 1945 return by $13,605.85 and, on his 1946 return, by $5,025.88.

After hearing the testimony of the income tax examiners, co-defendant Loechner changed her story from that originally told by her to the government examiners and also from that told to the examiners by Dr. Gariepy and his then attorney. She testified that she took the total of the black books, the total of the yellow sheets less the Michigan Medical Service total, and submitted this information, along with the information from Form 1099 sent by the Michigan

Medical Service, to the Beasaw office; and that she used the insurance memorandum books [from which Exhibits 112 and 113 were compiled] in preparing information for the tax returns. Her testimony concerning receipts from surgical fees and payments made by insurance companies was contradicted by many patients who had paid surgical fees without benefit of any insurance or with the aid of the Michigan Medical Service. Her testimony was also contradicted by a representative of the Michigan Medical Service. Of some seventy patients who testified, many said that, in 1945, they were not insured at all but had paid Dr. Gariepy for professional services. Others of them testified that they were insured by Michigan Medical Service and had paid Dr. Gariepy specified amounts. The total of these payments to the doctor aggregated $8,965. Thirty-five patients swore to a total of $5,506 for the year 1946, paid either from their own funds or by Michigan Medical Service. Miss Loechner's testimony concerning the fees and the insurance records was confused and confusing, boiling down to an admission that she did not know where she got the information contained in the records. The record in the case reveals that she said: "Where I got the information that I recorded in that insurance—and I add the word 'surgery' now, I don't know anywhere in particular, except I do know what the amount was taken in from surgery. I got the information from the yellow account sheets. How I knew when I went to the yellow account sheets, that an item that I picked from the yellow account sheet was to go under American Medical Society I didn't know. As I said before, there was no reason for that book. That book had nothing to do with it. I have no reason for it. Why I made such a list I don't know. There is no particular reason, except one thing, as I said before, those insurance companies that different patients had had association with and they were on their charts or account sheets. When I made a list up of those patients from the account sheets right now I wouldn't know from the account sheet under what company to put

them. There was no reason. As I say, that had nothing to do with the income tax." The yellow sheets about which she testified so glibly were those destroyed by Dr. Gariepy.

We think there is unquestionably substantial evidence that appellant Gariepy caused his income tax returns for the years in question to be understated in a deliberate and wilful effort to evade taxes. He was not wholly unacquainted with a simple system of accounting, as evidenced by the fact that when working in a drug store before becoming a doctor he made bookkeeping entries in his employer's records. His testimony disclosed that he was well acquainted with the method by which his books were kept; and that he well understood the difference between a day book and a ledger sheet. He testified that all the money received from his professional services was reflected in ledger sheets, except such portion thereof as was recorded in the Rex Beasaw books. He said that "by adding the Rex books and the ledger sheets you got the total amount." He admitted that he had been given by Mrs. Baldinger, at the end of each day, all checks and cash taken in. He swore that he had not included in the black books all the monies which he received, for the reason that the ledger sheets reflected all such money not appearing on the black Rex books. He knew that to get a complete accounting of the total amount of money received by him in any one year would require the addition of the sums shown on the account ledger cards and the receipts appearing in the black books; and, yet, while the accuracy of his income tax returns for 1945 and 1946 were in serious question, he permitted these all-important ledger sheets to be destroyed after he had deliberately removed them from his office to the attic of his home. Not until after he was informed that the investigation would require contact with his patients to ascertain what they had paid him did he reveal the fact that he had kept duplicate receipt records.

The doctor told Revenue Agent Price that he maintained a record of accounts receivable but destroyed the record

when an account was paid. He preserved records of unpaid accounts only. In January of 1947, Dr. Gariepy commenced transferring the information on the yellow cards to new records and carried the old records home.

The government obtained from Mt. Carmel Hospital a list of the doctor's patients and sent them questionnaires in an effort to determine his correct income. One of these patients testified that when she received the qustionnaire she telephoned the doctor and asked him what to do with it. He told her to send it to him. She did. When it was returned to the Bureau of Internal Revenue, there was typed on it: "I do not remember the dates. I do not keep my receipts longer than one year." The patient testified that she had not typed this statement on the questionnaire. Another patient stated that when he received the list of questions he took it to Dr. Gariepy and inquired about it. The doctor told him that it was just a routine check-up and to forget it. The doctor stated that he would take care of it, then tore up the questionnaire and threw it into a wastebasket. These two incidents, coupled with the other evidence, were incriminating.

Under the authorities, the conduct of Dr. Gariepy was of such character as to support a plain inference that he wilfully attempted income tax evasion. As was said in *Spies* v. *United States*, 317 U. S. 492, 499: "... By way of illustration, and not by way of limitation, we would think affirmative willful attempt may be inferred from conduct such as keeping a double set of books, making false entries or alterations, or false invoices or documents, destruction of books or records, concealment of assets or covering up sources of income, handling of one's affairs to avoid making the records usual in transactions of the kind, and any conduct, the likely effect of which would be to mislead or to conceal."

As authority for the proposition that the jury in the instant case had substantial evidence upon which to convict appellant of wilful income tax evasion and that the

district judge properly denied the motion of appellant for judgment of acquittal made at the close of the government's case and renewed when all the evidence in the case had been received, see opinions of this court in *Battjes* v. *United States*, 172 F. (2d) 1 (C. A. 6); *Gariepy* v. *United States*, 189 F. (2d) 459, 463 (C. A. 6), wherein conviction of appellant's brother for income tax evasion was affirmed. See illustrative authorities from other circuits: *Kobey* v. *United States*, 208 F. (2d) 583 (C. A. 9); *United States* v. *Lange*, 161 F. (2d) 699, 704 (C. A. 7); *Myres* v. *United States*, 174 F. (2d) 329, 336 (C. A. 8), certiorari denied 338 U. S. 49; *Olson* v. *United States*, 191 F. (2d) 985, 989 (C. A. 8); *Sasser* v. *United States*, 208 F. (2d) 535, 539 (C. A. 5); *Barshop* v. *United States*, 191 F. (2d) 286, 293 (C. A. 5), certiorari denied 342 U. S. 920; *Maxfield* v. *United States*, 152 F. (2d) 593, 597 (C. A. 9), certiorari denied 327 U. S. 794.

Appellant avers that the district court erred in denying his challenge to the array of the petit jury panel, for the reason that the entire panel was drawn from Wayne and Oakland Counties, which constitute only two of the sixteen counties comprising the Southern Division of the Eastern District of Michigan. The indictment and trial of appellant's brother, Dr. Bernard Gariepy, had received unusual publicity in newspapers published in Wayne and Oakland Counties, as well as from radio and television. After conviction of appellant's brother [*Gariepy* v. *United States*, 189 F. (2d) 459 (C. A. 6), supra], the indictment of appellant for income tax evasion had been predicted by radio broadcast, as well as in newspapers published in Detroit. There was no professional association between the brothers Gariepy and, as alleged in the affidavit in support of the challenge to the panel array, there had been no "fraternal association" between them for more than fifteen years. Undoubtedly, appellant received bad press notices in Detroit, where he was engaged in practice.

The pertinent Code provision is that both grand and

petit juries shall be selected from such parts of the district as the court directs, so as to be most favorable to an impartial trial, and not to incur unnecessary expenses or unduly burden the citizens of any part of a district with jury service. Section 1865a, Title 28, U. S. C. A.

Appellant cites *Delaney* v. *United States*, 199 F. (2d) 107, 113 (C. A. 1); *Frantz* v. *United States*, 62 F. (2d) 737, 738 (C. A. 6); *Walker* v. *United States*, 116 F. (2d) 458, 462 (C. A. 9); and *Local 36, International Fishermen, Etc.* v. *United States*, 177 F. (2d) 320, 338-342 (C. A. 9) [opinion written by the designated trial judge in the instant case]. In the first cited authority (Delaney), the court said that it was not "a case of pre-trial publicity of damaging material, tending to indicate the guilt of defendant, dug up by the initiative and private enterprise of newspapers", but was a case where the United States, through open committee hearings in its legislative department shortly before the trial of a pending indictment, had caused and stimulated "massive pre-trial publicity, on a nationwide scale." The *Frantz* and *Walker* cases carry no further than to support the power of the trial court to exercise discretion in the matter of summoning jury panels.

Appellant emphasizes the opinion of this court in *Marson* v. *United States*, 203 F. (2d) 904, 909 (C. A. 6), wherein we reversed a conviction in a criminal case because of the refusal of the district judge to interrogate the jurors to ascertain whether they had been prejudiced by reading a newspaper article that linked the defendant's name with those of two convicted criminals. In that case, moreover, we held that the judge had examined the jurors on voir dire in a manner highly prejudicial to the defendant and had refused to question the jurors in compliance with proper motions made by defendant's counsel. The action of the judge in the *Marson* case is in no wise comparable to the situation found here. The record fails to show that the examination of jurors in the instant case was in any manner improper. Inasmuch as no showing has been made of

abuse of the court's discretionary power, no error is found in the action of the trial court in denying appellant's challenge to the array. See *United States* v. *Gottfried*, 165 F. (2d) 360, 363, 364 (C. A. 2), certiorari denied 333 U. S. 860, rehearing denied 333 U. S. 883.

Appellant urges that the instant indictment cannot sustain his conviction under section 145(b) of the Internal Revenue Code "where the only means of the attempt to defeat and evade income taxes" alleged was the filing of unsigned tax returns. He draws a distinction between the misdemeanor with a maximum penalty of one year's imprisonment and a fine for wilful failure to file a return, as defined in section 145(a), I. R. C., and the felony defined in section 145(b) of the Internal Revenue Code, in the wilful attempt to evade or defeat the payment of income taxes. He relies principally upon the opinion of the Supreme Court in the *Spies* case (317 U. S. 492). A careful reading of the opinion in that case does not warrant the inference which appellant seeks to draw from it. Mr. Justice Jackson declared that a wilful attempt to defeat or evade taxes may be accomplished by "any conduct, the likely effect of which would be to mislead or to conceal." See *United States* v. *Smith*, 206 F. (2d) 905 (C. A. 3); *Montgomery* v. *United States*, 203 F. (2d) 887, 889 (C. A. 5). Compare *Emmich* v. *United States*, 298 Fed. 5, 9 (C. A. 6). Here the attempted evasion was accomplished by appellant's filing with the Collector of Internal Revenue false documents which purported to be income tax returns. See also *United States* v. *Beacon Brass Co.*, 344 U. S. 43. The indictment was sufficient to inform the accused of the crime charged, so that he could adequately prepare his defenses and could plead the judgment in bar of another trial for the same offense. *United States* v. *Behrman*, 258 U. S. 280. This doctrine is so well established in this jurisdiction and elsewhere as to require no repetition here of authorities so often cited.

Appellant argues that the "purported" returns did not constitute income tax returns under the law; that the filing

of the unsigned documents did not constitute the commission of an affirmative act requisite to sustain conviction under section 145(b). We think this contention runs contrary to the holding of this court in *Emmich* v. *United States,* 298 F. 5, 9 (C. A. 6), where it was said: "The real character of the offense lies, not in the failure to file a return, or in the filing of a false return, but rather in the attempt to defraud the government by evading the tax." The specious contention of appellant comes rather late. At the trial, he did not deny that the documents filed with the Collector of Internal Revenue on his behalf were in fact income tax returns. Indeed, he identified the documents as his income tax returns for 1945 and 1946 and denied that he had purposely omitted signing the returns; and, in respect of the 1946 return, stated that the tax was paid by his wife in conformity with the return.

Appellant insists that the following sentence in the charge of the court to the jury constitutes reversible error: "The defendant Gariepy must be taken to have had knowledge that his income for the calendar years 1945 and '46 was as stated by the accountants in the purported tax returns for those years respectively." The opinion of this court in *Lurding* v. *United States,* 179 F. (2d) 419, 421, 422 (C. A. 6), is cited as direct authority for reversal. There, we said that the "doctrine of *respondeat superior* is not to be drawn from the law of negligence and applied to criminal liability." But we said, further, that the fact that the taxpayer did not make out the return "becomes immaterial only when the Government has established, by direct proof or by circumstances, that the taxpayer knew or perhaps should have known that the return was false." Lifting out of context an isolated paragraph of a charge as a basis of complaint that the selected statement constitutes reversible error, where the charge in entirety fully and adequately protects the lawful rights of the appellant, does not meet our approbation. The instructions of the experienced trial judge made it clear that Dr. Gariepy should not be convicted unless it was proved by convincing evidence be-

yond any reasonable doubt that his conduct constituted a knowing and wilful attempt to defeat and evade his lawful income taxes.

The jurors were told, *inter alia,* that: "Before the defendant can be found guilty, you must find beyond a reasonable doubt such omissions, if any, had been made with the specific intent to defeat and evade part of the income tax due and owing for the particular year in question." And, following the paragraph of the charge of which complaint is made, the judge instructed: "The defendant cannot be held guilty simply because he was a poor bookkeeper or that there were poor office system in practice in his office, or that he was pressed by the amount of business that he was doing, if you find such is the case; but you must find that the returns for the year in question failed to reflect the amounts of money received knowingly and wilfully. It must be proved beyond a reasonable doubt that the defendant knew that substantial sums of money received by him from patients for surgery were not placed of record in such a manner that these payments would be reflected in his income tax return. If you find that substantial amounts both in number and in volume were actually paid to the defendant Gariepy either personally or through the defendant Loechner, or to any other person, and of which he knew that such amounts were not shown to be included on the purported tax return, you may consider whether the defendant knew such amount was not being reported on the purported tax return, and then you will consider the question of wilfulness. . . . but you cannot find the defendant Gariepy guilty unless you find beyond a reasonable doubt that he had knowledge that he received more money than that reported and wilfully attempted to defeat and evade the tax imposed thereon in the manner charged in the indictment. . . . It must be proved that the defendant acted not only knowingly, as I said above, but that he has acted wilfully in an attempt to evade and defeat a particular tax charged or a portion of it. . . . Wilfulness is an essential element of the crime charged. Wilfulness is the

state of mind of the defendant where he is fully aware of the existence of a tax imposed upon him by the law which he seeks to evade or defeat. Wilful evasion requires an intentional act or omission as compared to an accidental or inadvertent. It requires a specific wrongful intent to defeat or evade the tax obligation known to exist. . . . There can be no crime without a criminal intent, as the court has just now instructed you, and in this case, the specific intent is necessary to constitute the crime under the charge made in the indictment."

No exception was taken by appellant's attorneys to the paragraph of which complaint is now made. Rule 30 of the Federal Rules of Criminal Procedure provides that error cannot be assigned to any portions of or omissions from a charge, unless objection thereto is made before the jury retires. The rule requires that the grounds for the objection be stated distinctly. We agree with the expression in *United States* v. *Raub*, 177 F. (2d) 312, 315 (C. A. 7), that Rule 52(b) should not be lightly invoked. That rule gives the appellate court discretion to notice plain errors or defects affecting substantial rights. See *Paschen* v. *United States*, 70 F. (2d) 491 (C. A. 7); *Barshop* v. *United States*, 191 F. (2d) 286 (C. A. 5), certiorari denied 342 U. S. 920; *Norwiti* v. *United States*, 195 F. (2d) 127 (C. A. 9), certiorari denied 344 U. S. 17; *Norris* v. *United States*, 205 F. (2d) 828 (C. A. 2).

Appellant assigns error on the part of the court in charging the jury that the duty of filing a correct and accurate income tax return was personal to the appellant and could not be delegated. This assignment of error is, likewise, based on no exception taken at the trial. The law did impose a non-delegable duty upon appellant to file a correct and accurate income tax return; and, in the entire context, as has been plainly indicated heretofore, the appellant was given in the court's charge to the jury the benefit of accurate and fair instructions which adequately protected his interests. *Banks* v. *United States*, 204 F. (2d) 666, 673

(C. A. 8), certiorari denied 346 U. S. 857; *Beaty* v. *United States*, 203 F. (2d) 652 (C. A. 4); *Paschen* v. *United States*, 70 F. (2d) 491, 499 (C. A. 7).

Complaint is made of alleged error in the court's charge when the jurors were told that evidence of previous good reputation "may not only raise a doubt of guilt, but may, *in connection with all the other evidence in the case* [emphasis added], bring conviction of innocence", with the added comment, "however, persons of previous good reputation have been known to commit crimes." The assignment of error is not well taken. See *Colbert* v. *United States*, 146 F. (2d) 10, 11 (D. C. App.); *United States* v. *Antonelli Fireworks Company*, 155 F. (2d) 631, 639 (C. A. 2). These cases, we think, correctly interpret the expression of the Supreme Court in *Edgington* v. *United States*, 164 U. S. 361, 366. As was stated in the *Antonelli* case, *supra*, the effect of the *Edgington* case, by net balance, seems to be that a trial court should not tell a jury to consider character evidence only when the scales are in balance.

The district court was not in error in rejecting appellant's special requests to charge, numbered respectively XXV, pertaining to reputation evidence, and XXVI, pertaining to reasonable doubt. The proposition pertaining to XXV has been discussed. As to XXVI, the court accurately charged concerning "reasonable doubt." Appellant avers that the charge of the district court was "erroneous, confusing and contradictory, when it charged (1) that the alleged offense could be committed in *any* manner, and (2) that it could only be committed *in the manner alleged in the indictment.*" [Emphasis supplied.] Again, in a strained effort to charge error, the appellant lifts out of context a portion of the court's instructions to the jury. The charge, read as a whole, was both clear and correct. The jury was told specifically: "You cannot find the defendant Gariepy guilty unless you find beyond a reasonable doubt that he had knowledge that he received more money than that reported and wilfully attempted to defeat and

evade the tax imposed thereon *in the manner charged in the indictment.*" [Emphasis added.] The defendant failed to take exception to the portion of the charge of which complaint is now made, thus again failing to observe the requirement of Rule 30, Federal Rules of Criminal Procedure.

Appellant complains that the district judge erred when, in responding to the jury's inquiry, he instructed that one defendant could be convicted by them with a recommendation for leniency. The judge was scrupulously careful and accurate in answering the jury's inquiry as he did. Compare *Burchman* v. *United States*, 163 F. (2d) 761, 762 (D. C. App.); *United States* v. *Parker*, 103 F. (2d) 857, 863 (C. A. 3).

Appellant urgently insists that the trial judge committed reversible error in shutting off cross-examination of J. G. Philpott [a special agent and group supervisor of the Internal Revenue Service at Detroit] concerning reports by government agents working under him as to payments alleged to have been made to Dr. Gariepy by various insurance companies. The subject matter was important, in that the theory of the government was that the amounts of money reflected in the doctor's black books and on the "insurance lists" [prepared by government agents from a "memorandum" book, or books, made up by the doctor's nurse, the co-defendant Marie Loechner], which had been introduced in evidence as Government Exhibits 112 and 113, were the amounts which had been disclosed in his income tax returns; whereas, in fact, they did not constitute a complete record of receipts from his professional practice, inasmuch as some 138 witnesses had testified to having paid the doctor amounts ranging from $25 to $500, of which there was no record anywhere in the doctor's books.

Dr. Gariepy testified that he had not prepared the insurance books and had never seen them; and that he had no knowledge of them. Miss Loechner testified that she had made up what she called the "insurance memorandum books" after she had given to Rex Beasaw the figures for the doctor's income tax. She said, moreover, that the so-

called insurance books were not kept in the ordinary course of the doctor's business and had nothing to do with it. She furnished the accountants with figures derived from the yellow account sheets and from the black books. Asked why she made up these insurance memorandum books, she answered, "Well, the only thing I can recall right now, it was just possibly a way of keeping track of some of the companies that either we, the office, or the patients may have had some dealings with, or insurance papers that were filled out." She said it could be possible that there were some entries in the insurance books of payments made by the insurance companies direct to the patients, who later paid the money to the doctor.

Government Agent Philpott had not personally examined the insurance company records and had not previously testified concerning them when he was questioned by appellant's attorney regarding the results of the government's investigation as to payments made by insurance companies to appellant during the years 1945 and 1946. The best evidence of this would have been the records of the insurance companies. The attorney for the government urged that it was incumbent upon defendants to have brought in the insurance companies "as part of the defense of this case." Defendant's attorneys asserted that they had been taken by surprise. The trial judge disagreed with them.

As far as the record shows, appellant failed, after the incident, to call as witnesses the government agents *who had made the investigations at the offices of the insurance companies;* but introduced certain insurance company officials with the result that some of the payments were disclosed, but many records, according to the officials, had been destroyed after three years, or were at the home offices and not available for the trial, or such records had not been kept in complete form.

It would seem that the trial court acted within the limits of its discretion in denying appellant the right to cross-examine Philpott concerning records which he, himself,

had not made; and, moreover, appellant, in preparation of his defense, should not have relied upon eliciting by cross-examination facts which he deemed important to be proved but should have made timely preparation to present his affirmative proof. Cross-examination is, of course, of highest importance in an effort to elicit truth, but its limitation in the circumstances of each case rests largely within the sound discretion of the trial court. *Glasser* v. *United States,* 315 U. S. 60, 83; *Banning* v. *United States,* 130 F. (2d) 330, 337 (C. A. 6), certiorari denied 317 U. S. 695. See also *Bell* v. *United States,* 185 F. (2d) 302, 310, 311 (C. A. 4); *United States* v. *Hornstein,* 176 F. (2d) 217, 220 (C. A. 7); *Chevillard* v. *United States,* 155 F. (2d) 929 (C. A. 9); *United States* v. *Stoehr,* 196 F. (2d) 276, 280 (C. A. 3), certiorari denied 344 U. S. 826.

Appellant insists that the trial court committed reversible error in saying to the United States Attorney in the presence and hearing of the jury: "I think your case can be made without calling all those witnesses." At the time of the judge's comment, the government had introduced some seventy former patients of Dr. Gariepy who had testified that they had made payments to him for professional services. The judge stated that it would be a waste of both his and the jury's time to call very many more witnesses testifying along the same line and that he would place a limitation upon such testimony. In the context, the judge's remark would not tend to create the impression upon the jury that he considered the proof already adduced sufficient to establish the guilt of the accused. Defendant's attorney made so much ado about it, however, that the judge, later on in the trial, thus addressed the jury: "Ladies and Gentlemen of the Jury, counsel seem to have thought that the court had made a mistake by indicating that I didn't think that maybe it was necessary to call all the witnesses of this type. That is true, and I may find it necessary to place a limitation on this type of witness. I want you to remember that in what I said *I did not express*

any opinion on the merits of this case or the guilt or innocence of the defendant. That is a question we will leave for you." [Italics supplied.] In our judgment, this explanation was adequate to relieve any possible adverse impression which might have been conveyed to the jury by the court's admonition to the district attorney. The criticism of the trial judge would seem to be captious. As was observed in *Glasser* v. *United States,* 315 U. S. 60, 83, magnification on appeal of instances of little importance in their trial setting should be guarded against. The trial judge stated that a parade of government witnesses that was in the offing could have been "quite prejudicial to the defendant" and that in limiting the number of witnesses he had actually acted in the interest of the defendant. We think he acted discreetly.

No parallelism whatever with the present case is found in the circumstances disclosed in *Starr* v. *United States,* 153 U. S. 614, cited by appellant.

Finally, appellant charges that the attitude of the trial judge toward appellant's attorneys manifested extreme impatience and almost hostility, as contrasted with his solicitude and consideration for government counsel; and that his conduct of the trial, when considered as a whole, constituted denial to appellant of his right to a fair and impartial trial. Appellant has cited and we have given due consideration to the following authorities: *United States* v. *Minuse,* 114 F. (2d) 36, 39 (C. A. 2); *Egan* v. *United States,* 287 F. 958, 971; *Frantz* v. *United States,* 62 F. (2d) 737, 739 (C. A. 6); *Braswell* v. *United States,* 200 F. (2d) 597, 602 (C. A. 5); *Starr* v. *United States,* 153 U. S. 614, 626; *Bollenbach* v. *United States,* 326 U. S. 607, 612; *Sunderland* v. *United States,* 19 F. (2d) 202, 216 (C. A. 8); *Wheeler* v. *Wallace,* 53 Mich. 355, 358 (opinion by Mr. Justice Cooley).

While in the instant case the distinguished trial judge was at times quite tart toward appellant's counsel in his rulings and comments, we are not convinced that he tran-

scended the bounds of propriety or exhibited an attitude of such hostility toward these able and courteous attorneys as to cause a verdict to be rendered against appellant which otherwise would not have been found by the jury. The evidence of appellant's guilt of the crimes charged was adequately substantial.

There being no reversible error disclosed by the record of proceedings and trial in the district court, its judgment of conviction and sentence is affirmed.

APPENDIX B

Judgment and Order Denying Petition for Rehearing

Case Argued and Submitted

December 17, 1954—Before: MARTIN, MCALLISTER, and STEWART, JJ.

This cause is argued by James E. Haggerty and Harry Nayer for appellant, by George E. Woods and William A. Barnett for appellee and is submitted to the court.

Judgment

(Filed March 9, 1955)

Appeal from the District Court of the United States for the Eastern District of Michigan.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Michigan, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of conviction and sentence of the said District Court in this cause be and the same is hereby affirmed.

Order Denying Petition for Rehearing

(Filed April 28, 1955)

The petition for rehearing is denied.

APPENDIX C

Constitutional Provisions, Statutes and Rules Involved

The *Sixth Amendment to the Constitution* provides in relevant part:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law * * * ."

The *Act of June 25, 1948*, 62 Stat. 952, 28 U.S.C. Section 1865(a) provides:

> "(a) Grand and petit jurors shall from time to time be selected from such parts of the district as the court directs so as to be most favorable to an impartial trial, and not to incur unnecessary expense or unduly burden the citizens of any part of the district with jury service. To this end the court may direct the maintenance of separate jury boxes for some or all of the places for holding court in the district and may appoint a jury commissioner for each such place."

Section 145 of the Internal Revenue Code of 1939, 52 Stat. 513, as amended, 26 U.S.C. Section 145 provides in relevant part as follows:

> "(a) Failure to file returns, submit information, or pay tax.
>
> "Any person required under this chapter to pay any estimated tax or tax, or required by law or regulations made under authority thereof to make a return or declaration, keep any records, or supply any information, for the purposes of the computation, assessment, or collection of any estimated tax or tax imposed by this chapter, who willfully fails to pay such estimated tax or tax, make such return or declaration, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than

one year, or both, together with the costs of prosecution.

"(b) Failure to collect and pay over tax, or attempt to defeat or evade tax.

"Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

" * * * "

Section 3616 of the Internal Revenue Code of 1939, 53 Stat. 440, 26 U.S.C. Section 3616 provides as follows:

"Whenever any person—

"(a) False returns.

"Delivers or discloses to the collector or deputy any false or fraudulent list, return, account, or statement, with intent to defeat or evade the valuation, enumeration, or assessment intended to be made; or

" * * * he shall be fined not exceeding $1,000, or be imprisoned not exceeding one year, or both, at the discretion of the court, with costs of prosecution."

The *Federal Rules of Criminal Procedure,* following 18 U.S.C. Section 3771, provide in part as follows:

"RULE 31. VERDICT

" * * *

"(c) **Conviction of Less Offense.**

"The defendant may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein if the attempt is an offense."

APPENDIX D

Excerpts From Examination of Jury Panel Indicating Impact of Pre-Trial Publicity

The Court: * * * This case has attracted a good deal of attention, it is said, in the newspapers and perhaps in television and over the radio in the past. That has all been wiped out now and from now on if you are drawn as members of this panel and the panel as a whole up until the time that the voir dire here is completed and the panel is sworn to try the case, I instruct you at this time not to read anything in the newspapers about this case, not to listen to the radio, not to observe anything over television or receive any communication in any other matter which may bear upon this situation. (85)*

* * * * * * * * * *

The Court: Have any of you read about this case in the newspapers?

A Juror (and others): Yes, I have.

The Court: Please hold up your hands, all of you who have.

(Seven prospective jurors thereupon raised their hands.)

The Court: Those of you who have read of the case in the newspapers, did you at that time form or express any opinion as to the guilt or innocence of either of the defendants?

The Jurors: I did not. No, I haven't.

The Court: Have any of you a definite impression as to what you read at that time which would influence your mind in arriving at a verdict in this case?

The Jurors: No.

The Court: Have any of you heard anything over (95) radio, or have heard anything or heard anything over television which related to this case?

The Jurors: No.

The Court: The answer is all "No"?

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*All references in this Appendix are to the original transcript on file in the office of the Clerk, Supreme Court of the United States.

OOR COPY

The Jurors: "No."

The Court: How recently was any article you read?

Juror No. 1: There was a small article in some part of last week, I think it was. It was a small article. I just glanced over it, just a glance.

The Court: Probably a notice of the case coming up for trial?

Juror No. 1: Something like that; yes, sir.

The Court: Who next?

Juror No. 4: I didn't even notice that article. I did not read anything in the last few weeks. I did not see that article.

Juror No. 5: I didn't pay no attention.

The Court: What was the last article you read?

Juror No. 8: In today's paper.

The Court: Did that influence you in any way so that you have any impression as to the guilt or innocence of the defendants, or either of them?

Juror No. 8: No. (96)

* * * * * * * * * *

Mr. Haggerty: May I inquire, if it please the Court, if any of the prospective jurors have ever read in (100) the newspapers or heard through any other communication, such as radio or television, any comments or read any comments in reference to one Bernard Gariepy, a doctor of medicine?

The Court: Have any of you read or heard anything about Dr. Bernard Gariepy?

Juror No. 4: That is the other doctor that was tried—

The Court (Interposing): Just a moment. I didn't ask you that. I asked you if you heard or read anything about it?

Juror No. 4: I did read about a certain Dr. Gariepy.

The Court: Never mind stating what you read, because that might have some effect on some of the other people around here.

Mr. Haggerty: May I further inquire if what any of the

prospective jurors read or hears, if there is any confusion between Bernard Gariepy, M.D., and the defendant at bar, Louis J. Gariepy, M.D., confusion as to identity?

The Court: I take it that you having read about it, did you have any confusion in your mind as to the identity of the two?

Juror No. 4: No, sir.

The Court: Any other jurors have any confusion (101) in their minds about the identity of these two doctors?

Jurors: No.

Mr. Haggerty: Would what the prospective juror—there seems to be only one—read raise any prejudice in his mind that would take any evidence to eliminate as against Dr. Louis Gariepy, M.D.?

The Court: You feel you might be prejudiced by other occurrences and by things that do not pertain to this case?

Juror No. 4: No, sir.

The Court: With relation to some other person?

Juror No. 4: No, sir, not in the least. (102)

• • • • • • • • • • •

(Original Juror No. 5 having been excused on peremptory challenge, the following was directed to the successor)

The Court: You did not read any article in the papers?

Juror No. 5: Well, I think I read one a long time ago, and when I came in today I remembered it, but that is such a long time ago I had almost forgotten it.

The Court: There may be some confusion in (115) the names. You wouldn't be sure it was even the defendant in this case?

Juror No. 5: No, I wouldn't. (116)

• • • • • • • • • • •

(Original Juror No. 6 having been excused on peremptory challenge, the following was directed to the successor)

The Court: Do you know any other Dr. Gariepy's mentioned?

Juror No. 6: Well, what I read in the paper. (125)

The Court: I don't care what you read now. You have read something in the paper about some Dr. Gariepy?

Juror No. 6: Yes.

The Court: Do you know if that relates to this Dr. Gariepy or not?

Juror No. 6: I don't believe so.

The Court: And you know there is a distinction between certain of these three Dr. Gariepy's that have been mentioned?

Juror No. 6: Yes.

The Court: Could you take the evidence as comes into this case without regard to anything that you heard about any Dr. Gariepy outside?

Juror No. 6: Yes, I could.

The Court: And judge it fairly and impartially?

Juror No. 6: Yes. (125)

* * * * * * * * * *

The Court: Otherwise from what you read, do you know anything about the facts in the case?

Juror No. 6: No, only what I read in the paper.

The Court: You are not sure that related to this case?

Juror No. 6: I wouldn't be sure.

The Court: Presently you have no opinion on the merits in this case?

Juror No. 6: I have an opinion in a certain way.

The Court: That hardly conforms with the rest of the things you said. You have an opinion, you say. I don't care for an explanation. You have an opinion?

Juror No. 6: Yes, I do have an opinion.

The Court: Would that be based on something you heard or read?

Juror No. 6: Yes.

The Court: And you feel it would take evidence to remove that opinion?

Juror No. 6: It might.

The Court: Any objection to excusing Juror No. 6?

Mr. Haggerty: No, your Honor.

The Court: Call another juror. (126)

• • • • • • • • • • •

(Original Juror No. 10 having been excused on peremptory challenge, the following was directed to the successor)

The Court: Did you ever hear about, read about (130) or discuss this case before you came here as a juror?

Juror No. 10: I read about it long ago.

The Court: Are you sure it related to this case?

Juror No. 10: No, I am not.

The Court: Have you formed an opinion from what you read as to the merits of this case?

Juror No. 10: No, I have not.

The Court: You have no such opinion?

Juror No. 10: No. (131)

• • • • • • • • • • •

The Court: You heard the questions that I asked the regular panel?

Alternate Jurors 13 and 14: Yes, sir.

The Court: Is there any question I asked that suggests you wouldn't be qualified as jurors in this case?

Alternate Juror No. 13: No, sir.

Alternate Juror No. 14: I did hear a person discussing it, a group of persons.

The Court: You mean in the court house?

Alternate Juror No. 14: No, not in the court house, but where I work.

The Court: Did they pretend to know something about it?

Alternate Juror No. 14: No, they didn't pretend (153) to know anything about this case.

The Court: Just discussing it because they had read something about it in the newspaper?

Alternate Juror No. 14: Yes.

The Court: Did that produce any impression on your mind?

Alternate Juror No. 14: No.

The Court: In other words, you feel that you know how to decide this case now?

Alternate Juror No. 14: Yes, I do.

The Court: You feel you could decide it now?

Alternate Juror No. 14: Yes, I do.

The Court: All right, you are excused. Call another juror. (154)

APPENDIX E

Extracts Tending to Show the Hostility of the Trial Judge to Petitioner and His Counsel

A. To facilitate comparison between the treatment which the trial judge accorded defense counsel and the treatment accorded the prosecution on similar matters during the trial, colloquies are set forth below in parallel columns.

Comments to Defense	Comments to Prosecution
Mr. Haggerty: May it please the Court, the next group of witnesses have all been subpoenaed. Will your Honor request the Bailiff to ask if those persons are present?	Mr. Haggerty: I ask the testimony of this witness be stricken from the record.
The Court: No.	The Court: Do you expect to have any further testimony on this?
Ladies and gentlemen, we will take a short recess.	Mr. Murphy: May I have just a moment? Somebody has gone out to see if they can locate some witness that can connect it up.
(Thereupon the jury was retired from the courtroom, and the following occurred out of the presence and hearing of the jury.)	The Court: Under those circumstances, I will permit the testimony to remain, but if you do not connect it up, I will strike it out. (247a)
The Court: It is your responsibility to bring witnesses if you want to, and I am not going to sit here while that goes on. They are under the process of the Court, and I have no interest in whether you call them or not.	
Mr. Haggerty: I have subpoenaed the witnesses, may it please the Court, but you will not allow witnesses, in the courtroom. (431a)	

COMMENTS TO DEFENSE

Mr. Haggerty: • • •

Your Honor, due to your Honor's ruling, we are taken by surprise, and we will require time to subpoena in these various Government agents who have made the report and check on these various insurance companies that are listed in the Government's Exhibits 112 and 113. We are clearly taken by surprise at the court's ruling. I would like to ask an opportunity to complete the examination of this man, or the witness, Mr. Philpott, to lay the foundation, to obtain from him necessary information as to who made these checks, and so forth, so we may subpoena those witnesses.

• • • •

The Court: I don't think you are taken by surprsie at all, and in so far as I am concerned, I am not going to give you any time at all to make your record on that basis. (282a)

It is absolutely immaterial what this agent found out or anybody else, and I don't think —you can ask him that on cross-examination. He says he doesn't know, that settles it. You can make any offer of proof you want to about these or any other agents. You are not going to delay this case a minute. (282a-283a)

COMMENTS TO PROSECUTION

The Court: Counsel, the Court assumes that you were surprised by the ruling of the Court in regard to witnesses. This witness is hardly prepared at the present time without undue delay to proceed through this testimony, and under the circumstances, I think that the happiest plan would be to recess until tomorrow morning at 9:30 and hope that at that time you can make examinations off the stand and be prepared to testify somewhat more expeditiously. Can you do that if I should recess now? (254a-255a)

COMMENTS TO DEFENSE

Mr. Murphy: I offer Government's Exhibit No. 21.

Mr. Haggerty: May I see it for the purpose of examination, please?

* * * *

The Court: Let's proceed, gentlemen.

Mr. Haggerty: Your Honor, this is quite voluminous. I would like sufficient time—

The Court: I can't interrupt the trial that way. The testimony is in here with regard to them. I will give you an opportunity to examine them. The only question is admissability.

Mr. Haggerty: Well, I can't at this time.

The Court: The documents are admitted.

Mr. Haggerty: Exception, may it please the Court.

The Court: Yes, let's proceed. We can't delay this trial for examination of exhibits. You will have an opportunity to examine them some time before you cross-examine.

Mr. Haggerty: May I have the privilege of making a separate record not in the presence of the jury?

The Court: Yes.

Mr. Haggerty: At recess time?

The Court: Yes. This case is not going to be delayed by any such proceeding as that. (97a-98a)

COMMENTS TO PROSECUTION

The Court: This is going to be somewhat tedious; but I think the testimony would be incompetent unless you go through that formula. (254a)

(and)

The Court: In view of the consideration which you suggest, I will consider allowing you to have some of them Monday, in view of the weather conditions, but it has to be something different than just the ordinary run-of-the-mill witnesses. (198a)

B. The following brief extracts from the record reflect the treatment accorded by the trial judge to defense counsel during the trial. (Mr. Haggerty was counsel to Petitioner; Mr. Murray, counsel to co-defendant Loechner; and Mr. Murphy, Government counsel.)

Mr. Murphy (interposing): I will object to that question.

Mr. Haggerty: Just a minute. May I inquire of the reporter—

The Court: No; go ahead. (304a)

* * * * * * * * * *

Q. Will you answer my question, please?

A. Repeat the question, please.

Mr. Haggerty: May the reporter read it?

The Court: No; ask him another question. (327a)

* * * * * * * * * *

Mr. Haggerty: * * * Now, I think I should have been entitled, before it was admitted into evidence, to cross-examine the witness, but I didn't even have an ample opportunity to examine it.

The Court: I do not think that makes any difference and I overrule the objection. (100a)

* * * * * * * * * *

Q. Can you positively state that none of the amounts set forth in Exhibit 112 are not payments made and upon which you have based your analysis?

Mr. Murphy: Object to that question on the grounds it is improper cross examination.

Q. What is the next—

The Court: Objection is sustained.

Q. What is the next company?

A. Davis—

The Court: Wait until I rule, counsel.

Mr. Haggerty: I beg your pardon, your Honor.

The Court: Well, I should think you would. Go ahead. (311a)

* * * * * * * * * *

Mr. Haggerty: * * *

Will the Government stipulate, for the purpose of the record, with your Honor's consent, that I would ask these

questions that I have here asked pertaining to each insurance company for the years 1946 or '45?

The Court: So far as I am concerned, I am not going to indulge in any stipulation of which the court is a party. Try your case in your own way. (288a)

• • • • • • • • • • •

Mr. Haggerty: May it please the Court, at this time I desire to file my Requests to Charge with the Court, and serve opposing counsel.

(Documents were thereupon handed to the Court and counsel).

Will your honor indicate before arguments commence your ruling.

The Court: Yes. Of course, the Rules indicate that I should say what I am going to do—

Mr. Haggerty (Interposing): Yes, your Honor.

The Court (Continuing): —with the Instructions. I will tell you now what I will do with them. I will deny them. (496a)

• • • • • • • • • • •

The Court: Just a moment. Will there be any other statement?

Mr. Murray: I would like to reserve my opening statement until later.

The Court: Denied. You will make your statement now, if you will make any.

Mr. Murray: Very well. (334a)

• • • • • • • • • • •

Mr. Murray: Your Honor, we do have a sub-defendant here.

The Court: I understand you have, and in the ordinary criminal case, the rule for cross examination is that it will be conducted by one defendant's counsel for both unless there is some real reason something else should be done, and under these circumstances I see no reason for

permitting you to do it, and I hereby stop you from doing it.

Mr. Murray: Do I understand, then, your Honor?—

The Court: Just exactly what I have said, just in that many words. You understand me?

Mr. Murray: No, I do not, your Honor. May I inquire of the Court?

The Court: No. That is it.

Mr. Murray: Very well.

The Court: Take any exception you want. (314a-315a)

* * * * * * * * * *

Mr. Murray: I will object, your Honor. I believe we had just gone all through the names.

The Court: The exhibit is in evidence. I sustain the objection.

Mr. Murray: What is the basis of the objection? I didn't hear it.

The Court: Don't state anything. Whatever he wants to accept, it is all right. (314a)

* * * * * * * * * *

The Court: That motion won't do you any good unless the jury is here. If you want to make any motions like that the jury must be here.

Mr. Murray: You want the motion made before the jury?

The Court: I don't care whether you make it at all, but I say it won't do you any good as a matter of exception if it is not in the presence of the jury. If you want to make it in the presence of the jury—

Mr. Murray: Very well, I will make it in the presence of the jury.

The Court: Of course, I shall deny it. I will tell you that in advance.

Mr. Murray: Are you denying my present motion now, your Honor?

The Court: No, I am not denying it. I am just telling you that I will deny it when you make it. (283a)

* * * * * * * * * *

The Court: * * * The Court from this probation reports finds that the defendant as the court knew before, is a good husband, a good father, a very religious man, and a man who has engaged in tremendous charities. And the court also finds that the defendant is a man of great ability, and likewise that in the practice of his profession that he has a reputation for being an outstanding technician. A great many of these letters come from patients, people who feel that the community should not be deprived of his professional services.

As far as the probation report is concerned, the court finds nothing in the probation report which impells the court to grant probation, so the court will have to proceed to sentence in this matter, and at this time denies probation. (533a-534a)

C. During the cross examination of one of the Government's chief witnesses, the Treasury agent who had supervision of the investigation, Petitioner's counsel sought to procure from him information relating to "the possibility of overpayments on the so-called insurance accounts." (276a) When the witness indicated that such information was in the Government's possession, Petitioner's counsel then sought to ask specific questions relating to each of the insurance companies from which Petitioner had purportedly received certain stated amounts of income. (276a-279a) The trial court, after prompting the Government to object, sustained the objection to this line of examination. (279a)

The following colloquy then ensued:

Mr. Haggerty: May it please the Court, at this time, it is always my desire to cooperate to expedite trials. I have a long list of two exhibits. It is my purpose to ask these questions pertaining to each insurance company.

The Court: You can ask whatever questions you want to, Counsel.

Mr. Haggerty: That is the reason I have addressed the court at this time.

Will the Government stipulate, for the purpose of the record, with your Honor's consent, that I would ask these questions that I have here asked pertaining to each insurance company for the years 1946 or '45?

The Court: So far as I am concerned, I am not going to indulge in any stipulation of which the court is a party. Try your case in your own way. (288a)

* * * * * * * * * *

Following such refusal by the court, defense counsel then proceeded to ask the questions pertaining to each insurance company for the years 1945 and 1946. (289a-313a)

In the charge to the jury, the judge commented upon this incident as follows:

The Court: * * * There was only one incident in the course of the trial which the court shall mention. Counsel for the defendant Gariepy spent over an hour asking a series of questions as to what the Government's agent's examination had revealed as to payments made to the defendant Gariepy after the court had clearly ruled that such matters were immaterial. Persistent questioning might indicate to your mind that the defendant Gariepy was being denied something to which he was entitled, and that the United States agents had been unfair in the investigation; but the defendant Gariepy and his co-defendant were on trial. The Government of the United States is not on trial.

The question was not what the Government found out. The question was not what the Government found out after the time for filing the income tax for 1946 had passed in the spring of 1947, nor how long the Government took in the matter to reveal what had been done as has now been set out in the evidence.

The agents likewise are not on trial, but, of course, you may consider any testimony on the stand in weighing the

question of their credibility, the amount of credibility that you are going to give each of them.

The defendants Gariepy and Loechner are on trial on the charges of the indictment. Now, of course, you will not weigh the actions of counsel against either of the defendants, but on the other hand you will not draw unfavorable inferences against the Government for objecting to revealing the results of the investigation, because what the results of the investigation were have absolutely nothing to do with this case. It may have taken the Government a long time to find out the circumstances and the evidence which was used on this trial, but that is not to be considered by you in trying this case. (511a-512a)

* * * * * * * * * *

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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 103

LOUIS J. GARIEPY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. App. 1–20) is reported at 220 F. 2d 252.

JURISDICTION

The judgment of the Court of Appeals was entered March 9, 1955, and the petition for a rehearing was denied on April 28, 1955. (Pet. App. 20.) The petition for a writ of certiorari was filed May 27, 1955. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254 (1).

QUESTIONS PRESENTED

1. Whether the trial court erred in denying petitioner's motion challenging the array of the petit jury panel.

2. Whether the trial court erred in charging that petitioner had a non-delegable duty to file a correct and accurate income tax return.

3. Whether the trial court erred in failing to charge the jury with respect to lesser included offenses under Section 145 (a) and Section 3616 (a) of the Internal Revenue Code, although not requested to do so.

4. Whether the defense was unduly restricted in its cross-examination of a Treasury agent who testified for the Government.

5. Whether the trial court deprived petitioner of a fair trial by showing partiality.

STATUTES AND RULES INVOLVED

Internal Revenue Code of 1939:

SEC. 145. PENALTIES.

* * * * *

(b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the

payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * * *

(26 U. S. C. 1952 ed., Sec. 145.)

28 U. S. C.:

SEC. 1856. APPORTIONMENT WITHIN DISTRICT; ADDITIONAL JURY COMMISSIONERS.

(a) Grand and petit jurors shall from time to time be selected from such parts of the district as the court directs so as to be most favorable to an impartial trial, and not to incur unnecessary expense or unduly burden the citizens of any part of the district with jury service. To this end the court may direct the maintenance of separate jury boxes for some or all of the places for holding court in the district and may appoint a jury commissioner for each such place.

* * * * *

Federal Rules of Criminal Procedure:

Rule 30. *Instructions.* * * * No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to

make the objection out of the hearing of the jury.

Rule 31. *Verdict.*

* * * * *

(c) *Conviction of Less Offense.* The defendant may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein if the attempt is an offense.

* * * * *

STATEMENT

On March 13, 1952, a two count indictment was returned against petitioner and Marie Loechner, his employee, in the District Court of the United States for the Eastern District of Michigan, Southern Division, charging that they wilfully and knowingly attempted to defeat and evade a large part of petitioner's 1945 and 1946 income taxes by filing and causing to be filed false and fraudulent documents, purporting to be income tax returns. The amounts of net income and tax liability thereon, as reported in the returns and as corrected, were alleged to be as follows (D. 5–6):[1]

[1] The printed record in this Court consists of the separate appendices filed in the Court of Appeals by the petitioner (there the appellant) and the Government (there the appellee). References to the appellant's appendix will be designated herein as "D" and references to the appellee's appendix, as "R." References to the typewritten transcript will be designated "Tr."

Year	Reported		Corrected	
	Income	Tax	Income	Tax
1945	$39,069.80	$18,912.15	$67,067.26	$40,261.46
1946	28,411.66	10,445.47	58,071.41	29,804.88
Total	$67,481.02	$29,357.62	$125,138.77	$70,066.34

The trial court refused to quash the jury panel after hearing oral argument on petitioner's motion challenging the array. (1 Tr. 75.) Thereafter, the court conducted an examination of the panel and 29 individual prospective jurors, on *voir dire*. The jurors were examined individually and collectively under oath. Eight members of the panel had read something about either petitioner's case or the case of petitioner's brother[2] in the newspapers. None had heard the matter discussed on radio or television. Two were dismissed by the court on the ground that they had formed some opinion about the instant case. The jury finally selected (comprising 12 jurors and 2 alternates) included 10 persons who had never heard of either case; three persons who had read in the paper, that day, that the case was going to trial but who had had no previous knowledge of the matter; and one who had read an article a long time before about a Dr. Gariepy. This last juror stated that she had almost forgotten the

[2] Petitioner's brother, Dr. Bernard Gariepy, was convicted of income tax evasion in the same judicial district in 1949 (D. 16–17), and the conviction was affirmed in 1951. *Gariepy v. United States*, 189 F. 2d 459 (C. A. 6th).

matter and was not sure whether it concerned petitioner, and that in any event she had no opinion relative to the guilt or innocence of either defendant. (1 Tr. 79–150.) The defendants waived peremptory challenges No. 9 and No. 10 and counsel for petitioner stated (1 Tr. 150):

> Mr. Haggerty: We submit that the jury is now constituted, your Honor. We are satisfied with the jury as its exists at the present time.

The evidence may be summarized briefly as follows:

The documents mentioned above, purporting to be income tax returns, were prepared by the Rex Beasaw Income Tax Service.[3] The 1945 return was prepared from the Rex black books, a summary sheet of receipts and expenses furnished by petitioner's office, and oral information imparted by petitioner and his wife. (D. 94–95, 101–102, 318.) The Rex black books were daily record books of receipts and disbursements. Income entries in these books were regularly made by a receptionist and disbursements were entered by Miss Loechner. (D. 224–225, 233.) Lump sum payments for surgery, however, were deliberately omitted from the black books during 1945. (D. 232, 233, 470; R. 126.) Some surgical fees were entered in the black books in the year 1946 (R. 127), but not all of them (R. 137).

[3] The returns were not signed by petitioner but he conceded that they were his returns. (D. 358–359.)

Government Exhibits 112 and 113, described as "so-called insurance books," consisted of transcripts made from insurance memorandum books prepared by Miss Loechner. These transcripts were prepared by petitioner's attorney, Mr. Edward Weber, and given to the examining agents. The original insurance memorandum books prepared by Miss Loechner were not introduced because they were not in the Government's possession. (D. 186, 283; R. 138.)

Exhibit 113 pertains to the year 1945. The first page of the exhibit consists of a listing of the total amount of money received by petitioner during the year from the Michigan Medical Service and from 38 other firms, including insurance companies and industrial firms. The company names are listed together with a figure representing the amount of money received from each. The total received from the 39 companies is $50,861. Following this first page of Exhibit 113 are pages showing dates and amounts of the individual payments attributed to each of the insurance or industrial companies, exclusive of Michigan Medical Service. Exhibit 112 is similar to Exhibit 113, but pertains to the year 1946. The first page of Exhibit 112 shows $12,165.25 from Michigan Medical Service and a total of $18,984.25 from 25 other firms. (D. 186–190.)

The figures shown in Exhibit 112 and Exhibit 113, when added to the gross receipts shown in

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the black books, are identical with the gross receipts shown on the tax returns. (Govt. Exs. 1 and 2, D. 68–69, 98, 316, 490; R. 161.) That is to say, petitioner's *reported* income consisted of the sum of the receipts shown in the Rex black books and the receipts shown in the insurance books, Exhibits 112 and 113. (D. 98, 190, 317, 490, 491.)

The Government produced direct evidence that the petitioner had received numerous payments from surgery patients which were not reflected in either the Rex black books or the insurance memorandum books and were not reported on the returns.

The amounts of net income and tax liability, as reported in the returns and as proved by the Government, were as follows (Govt. Exs. 1 and 2, D. 328–330):

Year	Reported		Corrected	
	Income	Tax	Income	Tax
1945	$39,069.36	$18,912.15	$57,324.36	$32,518.00
1946	28,411.66	10,445.47	36,808.66	15,471.35
Total	$67,481.02	$29,357.62	$94,133.02	$47,989.35

The evidence tending to show petitioner's wilfulness (R. 6–7, 72–73, 108–109, D. 69–74, 90, 137, 226–228, 319–320, 385, 395, 400–401, 494) is summarized in the Court of Appeals' opinion (Pet. App. 2–9) and need not be repeated here in view of the fact that petitioner does not now raise the question whether the evidence was sufficient to support the verdict.

ARGUMENT

1. (a) Relying upon *Thiel* v. *Southern Pacific Co.*, 328 U. S. 217, which struck down the systematic practice of excluding from a jury panel all persons who worked for a daily wage, petitioner argues that there was prejudicial exclusion in the instant case because it is the practice of the district court to draw jurors from no more than five of the sixteen counties in the district and because only two counties were actually represented in the petit jury selected in this case.

There is, however, no indication in *Thiel* that it was the Court's purpose to overturn the settled rule, now embodied in 28 U. S. C. Section 1865 (a) (*supra*, p. 3), that the decision as to whether panels shall be drawn from the entire district or only from portions thereof is a matter within the sound discretion of the trial court. *Lewis* v. *United States*, 279 U. S. 63, 72; *Ruthenberg* v. *United States*, 245 U. S. 480, 482; *Walker* v. *United States*, 93 F. 2d 383 (C. A. 8th), certiorari denied, 303 U. S. 644, rehearing denied, 303 U. S. 668; *Frantz* v. *United States*, 62 F. 2d 737, 738 (C. A. 6th). This view is fully supported by holdings of the lower federal courts subsequent to the date of the *Thiel* decision. *United States* v. *Gottfried*, 165 F. 2d 360, 363–365 (C. A. 2d), certiorari denied, 333 U. S. 860, rehearing denied, 333 U. S. 883; *United States* v. *Titus*, 210 F. 2d 210, 212–213 (C. A. 2d); *United States* v. *Klock*, 210 F. 2d 217, 220 (C. A. 2d); *Thiel* v. *Southern*

Pacific Co., 67 F. Supp. 934, 942 (N. D. Calif.), affirmed, 169 F. 2d 30 (C. A. 9th), certiorari denied, 335 U. S. 872, rehearing denied, 335 U. S. 900. If the rule were otherwise, it would become necessary to draw jurors from an entire judicial district, a procedure which would involve heavy and unnecessary expenditures and cause hardship to jurors compelled to spend long periods far from their residences. Plainly, Section 1865 (a) accords a discretion sufficiently broad to avoid that result.

(b) Petitioner further challenges the composition of the jury panel on the ground that the two metropolitan counties which were represented were the two counties "most heavily saturated" with pretrial publicity (Pet. 12).[4] But the fact is that the trial court, recognizing the possibility of prejudice as a result of such publicity (D. 56), subjected the prospective jurors to exhaustive *voir dire* examination. As the record shows, only one member of the jury had heard of petitioner or his brother prior to the day of trial, and that juror had no recollection of the circumstances and had formed no opinion. See statement, *supra*, pp. 5–6. There is thus no foundation for the claim that the selection of jurors from the De-

[4] Petitioner does not suggest that the procedure followed in this case varied from usual practice or that there was any misconduct or wrongdoing on the part of the jury commissioner.

troit area impaired petitioner's right to a fair trial.[5]

2. (a) Petitioner argues (Pet. 16–22) that the trial court erred in instructing the jury that he had the duty of filing a correct and accurate return, keeping proper records, and turning them over to the persons preparing the return, and that "[t]he law made these duties personal to the defendant Gariepy, and he could not delegate these duties * * *" (Pet. 19, fn. 6). The contention is that petitioner did not maintain the records or prepare the returns personally; that he denied wilfulness with respect to any understatement of income that existed; and that this portion of the charge "in effect removed the theory of the defense from the jury's consideration." (Pet. 19.)

We point out, in the first place, that the objection was not presented to the trial court (a fact

[5] It is to be noted, additionally, that petitioner had not moved for a continuance or a change of venue, and that he did not exhaust peremptory challenges. The conflict asserted by petitioner (Pet. 14) between the instant case and *Delaney* v. *United States*, 199 F. 2d 107 (C. A. 1st), does not exist. There the conviction was reversed because of the trial court's denial of a motion for continuance, which obliged the defendant to stand trial in a hostile atmosphere created by "the United States, through its legislative department, by means of an open committee hearing held shortly before the trial" which "caused and stimulated this massive pre-trial publicity, on a nationwide scale" (199 F. 2d, p. 113). Moreover, the opinion in *Delaney* (pp. 112–113, 116) suggests that some of the jurors had been exposed to this publicity.

observed by the court of appeals, though it nonetheless considered the merits of the contention, Pet. App. 14). The failure to take an exception is alone dispositive. Federal Rules of Criminal Procedure, Rule 30, *supra*, pp. 3–4; *Johnson* v. *United States*, 318 U. S. 189, 200–201; *Wong Tai* v. *United States*, 273 U. S. 77, 83.

Secondly, we believe that the trial court's statement was entirely correct. It did no more than advise the jury of the statutory duties imposed by the internal revenue laws (Internal Revenue Code of 1939, Sections 51, 53, 54).

Finally, the instruction was not subject to the criticism that the jury might conclude that proof of wilfulness was not an ingredient of the offense charged, since the court proceeded to give most elaborate instructions concerning that requirement. These instructions are set forth in the discussion under (b), *infra*.

(b) Petitioner places considerable stress upon a paragraph of the charge which reads as follows:

> The defendant Gariepy must be taken to have had knowledge that his income for the calendar years 1945 and '46 was as stated by the accountants in the purported tax returns for those years respectively.

The argument, once again, is that the language suggests that proof of wilfulness was not essential. Once again, as the court of appeals noted (Pet. App. 14), no objection was made in the trial court.

The meaning of the passage, read alone, is unclear. Read together with the paragraph which immediately preceded it and the three paragraphs which followed, it is unmistakably plain that petitioner had the full benefit of an appropriate charge as to wilfulness.[6] We quote these five paragraphs in full (D. 517–518):

> Now, I have outlined the obligations which the law placed upon the defendant Gariepy. I want to charge you in that connection that the failure to carry out these obligations, even if you find that some or all of them occurred, *would not constitute a crime unless they were done knowingly and wilfully in an attempt to defeat and evade the tax imposed.*
>
> The defendant Gariepy must be taken to have had knowledge that his income for the calendar years 1945 and '46 was as stated by the accountants in the purported tax returns for those years respectively.
>
> If the Government has proved that his income was greater than the amount so stated, you should determine whether the defendant *had knowledge that his income was greater,* and in determining whether

[6] While it is unnecessary for present purposes to detail the evidence on wilfulness, we point out that there was overwhelming proof that petitioner's understatement of income was accomplished by careful design and accompanied by concealment and destruction of records as well as other incriminating acts. This evidence was fully examined in the Court of Appeals and is summarized in that court's lengthy and careful opinion (Pet. App. 2–9).

the defendant knew whether his income was greater in either calendar year than the amount stated in the purported return for that year, you have a right to consider all the evidence in the case. Particularly, you may consider any payments of money which were made to the defendant Gariepy personally or in his presence and *which he knew* and which were not included in the purported return for the calendar year.

The defendant cannot be held guilty simply because he was a poor bookkeeper or that there were poor office systems in practice in his office, or that he was pressed by the amount of business that he was doing, if you find such is the case; but you must find that the returns for the year in question failed to reflect the amounts of money received *knowingly* and *wilfully*. ***It must be proved beyond a reasonable doubt that the defendant knew that substantial sums of money received by him from patients for surgery were not placed of record in such a matter*** [sic] ***that these payments would be reflected in his income tax return.*** If you find that substantial amounts both in number and in volume were actually paid to the defendant Gariepy either personally or through the defendant Loechner, or to any other person, and of which he *knew* that such amounts were not shown to be included on the purported tax return, you may consider whether the defendant *knew* such amount was not being reported on the

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purported tax return, and then you will consider the question of *wilfulness.*

It is, of course, possible that defeat and evasion of a tax imposed could have been attempted where one knew that the amounts of money received during the year would require substantially greater tax than that actually paid by *wilfully* failing to keep or turn over to those preparing a return the true notation of the amounts paid by the surgical patients, or by *wilfully* failing to file, to sign or inspect the tax return, or by *wilfully* failing to have any connection with the making up and the filing of the return, or the payment of the tax or the deposit of the money in the bank; but you cannot find the defendant Gariepy guilty *unless you find beyond a reasonable doubt that he had knowledge that he received more money than that reported and wilfully attempted to defeat and evade the tax* imposed thereon in the manner charged in the indictment. [Emphasis added.]

3. Petitioner claims error in that the trial court failed to charge the jury that it might find petitioner guilty of a lesser included offense, *i. e.,* a misdemeanor under Section 145 (a) or Section 3616 (a) of the Internal Revenue Code of 1939, rather than the felony of tax evasion (under Section 145 (b)) alleged in the indictment. This Court has granted certiorari in *Dillon* v. *United States,* 218 F. 2d 97 (C. A. 8th), certiorari granted, 349 U. S. 914, an income tax evasion case in which

a request to give such a charge was refused. The instant case is distinguishable, for here no such request was made. Petitioner was not denied the "safeguard" of Rule 31 (c) of the Federal Rules of Criminal Procedure because of a "mere accident of chronology" (Pet. 24) but because he did not make the request to the trial court as required by Rule 30.

4. Petitioner also urges (Pet. 24–30) that he was improperly restricted in cross-examination of a Treasury agent who testified for the Government. As stated, *supra,* pp. 7–8, petitioner's reported gross receipts consisted of the amounts recorded in the Rex black books and those recorded in the insurance books. One of the theories of the defense (D. 333) was that the amounts recorded in the insurance books were overstated, and that in fact petitioner received far less from insurance companies than his books indicated. Pursuant to this theory, petitioner attempted to cross-examine the agent concerning the Government's investigations of the records of the insurance companies which had made payments to petitioner. (D. 276–282.)

The trial court's restriction of cross-examination was correct for several reasons. The inquiry was outside the scope of the direct examination, the agent having testified almost exclusively (D. 252–274) as to amounts received from individual patients and not recorded in the Rex black books, and having made little more than a passing refer-

ence (D. 274–275) to the insurance books. The inquiry called for hearsay testimony, since the agent was asked to testify from a memorandum prepared by other agents (D. 278–280). And the available records of the insurance companies would obviously be the best evidence, rather than the agent's testimony as to what some other agent had found in those records.[7]

Petitioner is incorrect in asserting (Pet. 27) that "this information was essential to the prosecution's case." The burden of establishing the inherently improbable proposition that petitioner's books grossly overstated the amounts received by him from particular sources, and that this counterbalanced unreported income from other sources, was upon petitioner. See *United States* v. *Hornstein*, 176 F. 2d 217 (C. A. 7th); *United States* v. *Stayback*, 212 F. 2d 313 (C. A. 3d),

[7] While petitioner made no attempt to call the two agents who had actually made the examination of the records in question (D. 280), he did call representatives of several of the insurance companies (D. 431–444). Some of them testified that their records had been destroyed or that they could find no records relating to petitioner. (D. 440, 441–444.) Representatives of two of the three companies stressed by petitioner (Pet. 25, fn. 12) testified that it was impossible to determine from their records the total amounts paid to him (D. 434–439). The representative of the other company stated that he could give only the total of checks made payable to petitioner; that he had no way of isolating the checks made payable to persons insured and endorsed by them to petitioner; and that checks were made payable to the physician only when it was expressly requested by the insured. (D. 431–434.)

certiorari denied, 348 U. S. 911; *United States* v. *Bender,* 218 F. 2d 869 (C. A. 7th), certiorari denied, 349 U. S. 920. Having failed to sustain the burden, and having made no effort to call the two agents who had originally made the examination of the insurance company records, petitioner cannot now be heard to charge the trial court with depriving him of a fair trial when the court did no more than exclude obviously objectionable testimony on the basis of well-settled principles of law.

Holland v. *United States,* 348 U. S. 121, upon which petitioner relies (Pet. 29–30), is not in point. In that case, this Court was speaking of leads furnished by taxpayers to show the sources of net worth increases in excess of reported income. In the instant case, no reason appeared why the records kept at petitioner's office should have overstated the income he received from insurance companies, or why they should have failed to reflect the fees paid by some 138 surgical patients who appeared as witnesses (Pet. App. 16). Nor does the record indicate that the Government had any information or evidence based on records which were unavailable at the time of trial.

5. Finally, it is suggested (Pet. 30–34) that petitioner was deprived of a fair trial because the trial judge displayed a "hostile attitude." The selected colloquies upon which petitioner relies are few in number when considered in the context

of a trial that lasted two and one-half weeks and certainly justify no more than the Court of Appeals' comment that the trial judge was at times "quite tart" (Pet. App. 19).

The Court of Appeals did not, as petitioner further suggests, reject petitioner's contention on this point because it was convinced by the proof of petitioner's guilt. It concluded, upon the basis of its examination of the record, that the trial judge had not "transcended the bounds of propriety" or exhibited an attitude which might have influenced the verdict (Pet. App. 19–20).

CONCLUSION

The decision of the court below is correct, and no question warranting review is presented. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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v.

UNITED STATES OF AMERICA, *Respondent.*

Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

In a Brief in Opposition before this Court in another case now pending on certiorari, the Government in effect has taken the position that a ground for reversal, or certainly a substantial question for review by this Court, exists where there has been systematic geographical exclusion in the selection of jurors, and where there was "something peculiar" about that portion of the population selected which "sharply distinguished" it from the total population. Thus, in

its *Brief in Opposition* in *Titus* v. *United States,* No. 175, October Term 1955, the Government has stated:

> "Petitioner has not demonstrated that there was something peculiar to the 239,386 people in Albany County which sharply distinguished them from the total population of the Northern District, and consequently resulted in his having other than an impartial trial." (P. 10, *Br. in Opp., Titus* v. *United States,* No. 175, O. T. 1955)[1]

If the standard suggested by the Government in that case is applied here—as reasonable consistency would appear to dictate—review by this Court seems plainly warranted.

Precisely the demonstration the Government claimed to be lacking in the *Titus* and *Klock* cases has been made here. In this case, the Petitioner clearly showed that the two counties in the district from which the members of the jury panel had been exclusively drawn were the counties in the district which had been most heavily saturated with pre-trial publicity adverse to him. And the Court below plainly conceded this:

> "The indictment and trial of appellant's brother, Dr. Bernard Gariepy, had received unusual publicity in newspapers published in Wayne and Oakland Counties, as well as from radio and television. After conviction of appellant's brother * * * the indictment of appellant for income tax evasion had been predicted by radio broadcast, as well as in newspapers published in Detroit. * * * Undoubtedly, appellant received bad press notices in Detroit * * *." (App. 9)

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[1] See also the Government's *Brief in Opposition,* p. 8, in *Klock* v. *United States,* No. 653, O.T. 1953, quoted in footnote 4 of our petition, page 12.

Apparently in order to overcome this clear demonstration "that there was something peculiar to the * * * people" in Oakland and Wayne Counties "which sharply distinguished them from the total population" of the district, the Government has shifted its ground of opposition in this case. It places reliance upon a so-called "exhaustive" *voir dire* examination as curing "the possibility of prejudice as a result of such publicity" (*Br. in Opp.*, p. 10).

But the excerpts from the *voir dire* examination set out in Appendix D to our Petition, indicate that the *voir dire* was hardly exhaustive. Repetition of one portion by way of illustration will suffice here:

> "(Original Juror No. 5 having been excused on peremptory challenge, the following was directed to the successor)
>
> "The Court: You did not read any article in the papers?
>
> "Juror No. 5: Well, I think I read one a long time ago, and when I came in today I remembered it, but that is such a long time ago I had almost forgotten it.
>
> "The Court: There may be some confusion in the names. You wouldn't be sure it was even the defendant in this case?
>
> "Juror No. 5: No, I wouldn't." (App. 25)

Even if the *voir dire* had been exhaustive, we do not believe that it could have purged from the case the prejudicial effects which the pre-trial publicity necessarily engendered. As the First Circuit has noted: "One cannot assume that the average juror is so endowed with a sense of detachment, so clear in his introspective perception of his own mental processes, that

he may confidently exclude even the unconscious influence of his preconceptions as to probable guilt, engendered by a pervasive pre-trial publicity." *Delaney* v. *United States,* 199 F. 2d 107, 112-113 (CA 1).[2]

As a reference to the newspaper clippings contained in the Supplemental Appendix for Appellant will alone make clear, few literate persons in the Detroit area (Wayne and Oakland Counties) during the years involved could have avoided acquiring some knowledge of or opinion about the troubles of either Dr. Bernard Gariepy or Petitioner, Dr. Louis J. Gariepy, or both.[3] And the excerpt from the interrogation of Juror No. 5 set out above illustrates that confusion between the brothers in the jurors' minds was a real and actual possibility.

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[2] The Government does not deny that there is a square conflict between the decision below and *Delaney* in the willingness of the appellate judges to rely "upon the therapeutic effect of *voir dire* examination to cure the detriment to Petitioner stemming from the adverse publicity," the conflict described in our Petition (p. 14). The difference in facts as to the *source* of the publicity which is the only difference pointed to by the Government (*Br. in Opp.*, p. 11), is no distinction whatever with respect to the prejudicial *effect* of the publicity, and cannot justify the conflict in decision on the proper judicial correction of that prejudice. Only this Court can spell out the extent to which *voir dire* examination alone can be relied upon in federal criminal trials to obviate any actual discriminatory effects from adverse publicity, which the Government in effect concedes might have "impaired petitioner's right to a fair trial" (*Br. in Opp.*, pp. 11-12), had it been more intensive; and which raises a general issue appropriate for resolution by this Court, as is made clear in our Petition (pp. 13-15).

[3] The newspaper clippings contained in the Supplemental Appendix for Appellant are, as they should be, limited to stories concerning Petitioner and do not reflect the publicity given to his brother's case. Examples of the type of newspaper publicity accorded Petitioner's brother are attached hereto.

The Government's statement on page 10 of its *Brief in Opposition* that "only one member of the jury had heard of petitioner or his brother prior to the day of trial, and that juror had no recollection of the circumstances and had formed no opinion" is misleading. The record indicates that seven of the jurors initially selected had read about this case in advance of trial (App. 23); Juror No. 4 knew about "the other doctor that was tried" (App. 24); Juror No. 6 admitted that he had read "something in the paper about some Dr. Gariepy" but did not know if it related to "this Dr. Gariepy or not" (App. 26); and other members of the jury panel likewise admitted having read or heard about one or the other of the Doctors Gariepy (see generally Appendix D). This, we submit, is more than adequate "foundation for the claim that the selection of jurors from the Detroit area impaired Petitioner's right to a fair trial." *Cf. Br. in Opp.*, pp. 10-11.

The Government also apparently seeks to extract some significance from the fact that the defendants waived two peremptory challenges, and Petitioner's counsel stated that he was satisfied with the jury as it existed just before the case went to trial. *Br. in Opp.*, p. 6.

But Petitioner's challenge to the array (13a-19a), vigorously made and argued (49a-60a), had already been denied (60a). All members of the jury panel were residents of the two counties most heavily saturated with adverse pre-trial publicity. The claim of prejudice was as strong against one as against any of the others. All the peremptory challenges and all the objections to the jury as constituted could not change the unalterable fact that the ultimate jury—so long as it was to be selected from the challenged panel—would

be composed of residents of Wayne and/or Oakland Counties.

It is rather extraordinary for the Government to suggest that defense counsel should have, in the presence of the prospective jury, again raised the challenge already overruled by the trial judge. To openly express dissatisfaction with the composition of the jury panel in its very presence would have been extremely naive, as any experienced trial lawyer knows. Petitioner's motion challenging the array had properly and timely established and protected his legal position on the question. The challenge to the array having been denied, it was incumbent upon Petitioner to proceed with the trial with the jury panel as it existed within the framework of the trial judge's ruling.

The Government's reply to Point I of our Petition raises more questions than it answers. Instead of justifying a denial of the requested writ of certiorari in this case, it bolsters and confirms the reasons set out in our Petition for this Court to consider the substantial questions presented.

* * * * *

The remaining points treated in the Government's Brief in Opposition in this case require no discussion beyond that contained in our Petition.

CONCLUSION

For the foregoing reasons and those contained in the Petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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